FEDERAL CONSENT DECREE FAIRNESS ACT, AND THE SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

ON

H.R. 3041 and H.R. 3862

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FEDERAL CONSENT DECREE FAIRNESS ACT, AND THE SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT OF 2012

FRIDAY, FEBRUARY 3, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS,
COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:32 a.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Gowdy, Ross, Quayle, Cohen, Conyers, Johnson, and Watt.

Staff Present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Johnny Mautz, Counsel; Rachel Dresen, Professional Staff Member; Omar Raschid, Professional Staff Member; Ashley Lewis, Clerk; and (Minority) James Park, Subcommittee Chief Counsel.

Mr. COBLE. The Subcommittee will come to order.

Today's hearing will highlight two important pieces of legislation dealing with consent decrees. Oftentimes when the Federal Government is sued by special interests for failure to fulfill its regulatory obligations, the Government will enter a consent decree in lieu of litigating. In these cases, the plaintiffs are reimbursed for their attorneys' fees, and the agencies are bound to the terms of the judicially approved decree.

Unfortunately, consent decree cases have become so commonplace that they are referred to as "sue and settle" litigation, and they have created a new path of regulatory influence whereby special interests use lawsuits and the courts to force the Federal Government to implement its priorities in the form of regulations.

Although consent decrees are efficient, they are not a wise method for issuing regulations. There is no public comment, and there is minimal disclosure, and they carry the force of law, which is difficult to overcome or challenge.

The first of the two bills being considered today is H.R. 3041, the "Federal Consent Decree Fairness Act." This legislation is intended to enhance the ability of State and local governments to show that consent decrees should be changed or even terminated, including when voters elect a new State or local administration.

[The bill, H.R. 3041, follows:]

112TH CONGRESS
1ST SESSION

H. R. 3041

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2011

Mr. COOPER (for himself, Mr. DAVIS of Kentucky, Mr. PAUL, and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Consent Decree Fairness Act".

SEC. 2. FINDINGS.

Congress finds that the United States Supreme Court, in its unanimous decision in Frew v. Hawkins, 540 U.S. 431 (2004), found the following:

(1) Consent decrees may "lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law,". 540 U.S. 431, 441.

(2) "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers.". 540 U.S. 431, 441.

(3) "The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials.". 540 U.S. 431, 442.

(4) "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities.". 540 U.S. 431, 442.

(5) "A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of

allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not.". 540 U.S. 431, 442.

SEC. 3. LIMITATION ON CONSENT DECREES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Consent decrees

"(a) DEFINITION.—In this section, the term 'consent decree'—

"(1) means any order imposing injunctive or other prospective relief against a State or local government, or a State or local official against whom suit is brought, that is entered by a court of the United States and is based in whole or part upon the consent or acquiescence of the parties; and

"(2) does not include—

"(A) any private settlement agreement;

"(B) any order arising from an action filed against a government official that is unrelated to his or her official duties;

"(C) any order entered by a court of the United States to implement a plan to end segregation of students or faculty on the basis of

race, color, or national origin in elementary schools, secondary schools, or institutions of higher education; and

"(D) any order entered in any action in which one State is an adverse party to another State.

"(b) LIMITATION ON DURATION.—

"(1) IN GENERAL.—A State or local government, or a State or local official who is a party to a consent decree (or the successor to that individual) may file a motion under this section with the court that entered the consent decree to modify or terminate the consent decree upon the earliest of—

"(A) 4 years after the consent decree is originally entered by a court of the United States, regardless of whether the consent decree has been modified or reentered during that period;

"(B) in the case of a civil action in which a State or an elected State official is a party, the date of expiration of the term of office of the highest elected State official who is a party to the consent decree;

"(C) in the case of a civil action in which a local government or elected local government

official is a party, the date of expiration of the term of office of the highest elected local government official who is a party to the consent decree;

"(D) in the case of a civil action in which the consent to the consent decree was authorized by an appointed State or local official, the date of expiration of the term of office of the elected official who appointed that State or local official, or the highest elected official in that State or local government; or

"(E) the date otherwise provided by law.

"(2) BURDEN OF PROOF.—

"(A) IN GENERAL.—With respect to any motion filed under paragraph (1), the burden of proof shall be on the party who originally filed the civil action to demonstrate that the denial of the motion to modify or terminate the consent decree or any part of the consent decree is necessary to prevent the violation of a requirement of Federal law that—

"(i) was actionable by such party; and

"(ii) was addressed in the consent decree.

"(B) FAILURE TO MEET BURDEN OF PROOF.—If a party fails to meet the burden of proof described in subparagraph (A), the court shall terminate the consent decree.

"(C) SATISFACTION OF BURDEN OF PROOF.—If a party meets the burden of proof described in subparagraph (A), the court shall ensure that any remaining provisions of the consent decree represent the least restrictive means by which to prevent such a violation.

"(3) RULING ON MOTION.—

"(A) IN GENERAL.—The court shall rule expeditiously on a motion filed under this subsection.

"(B) SCHEDULING ORDER.—Not later than 30 days after the filing of a motion under this subsection, the court shall enter a scheduling order that—

"(i) limits the time of the parties to—

"(I) file motions; and

"(II) complete any required discovery; and

"(ii) sets the date or dates of any hearings determined necessary.

"(C) STAY OF INJUNCTIVE OR PROSPECTIVE RELIEF.—In addition to any other orders authorized by law, the court may stay the injunctive or prospective relief set forth in the consent decree in an action under this subsection if a party opposing the motion to modify or terminate the consent decree seeks any continuance or delay that prevents the court from entering a final ruling on the motion within 180 days after the date on which the motion is filed.

"(c) OTHER FEDERAL COURT REMEDIES.—The provisions of this section shall not be interpreted to prohibit a Federal court from entering a new order for injunctive or prospective relief to the extent that it is otherwise authorized by Federal law.

"(d) AVAILABLE STATE COURT REMEDIES.—The provisions of this section shall not prohibit the parties to a consent decree from seeking appropriate relief under State law.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"1660. Consent decrees.".

SEC. 4. GENERAL PRINCIPLES.

(a) NO EFFECT ON OTHER LAWS RELATING TO MODIFYING OR VACATING CONSENT DECREES.—Nothing

in the amendments made by section 3 shall be construed to preempt or modify any other provision of law providing for the modification or vacating of a consent decree.

(b) FURTHER PROCEEDINGS NOT REQUIRED.—Nothing in the amendments made by section 3 shall be construed to affect or require further judicial proceedings relating to prior adjudications of liability or class certifications.

SEC. 5. DEFINITION.

In this Act, the term "consent decree" has the meaning given that term in section 1660(a) of title 28, United States Code, as added by section 3 of this Act.

SEC. 6. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act and apply to any consent decree regardless of—

(1) the date on which the order of the consent decree is entered; or

(2) whether any relief has been obtained under the consent decree before such date of enactment.

○

Mr. COBLE. The other bill scheduled for our review today is H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012." This legislation would infuse much-needed transparency and disclosure into sue and settle litigation by adding several requirements that will provide notice to stakeholders and will ensure that these decrees are adequately approved.

[The bill, H.R. 3862, follows:]

I

112TH CONGRESS
2D SESSION

H. R. 3862

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 1, 2012

Mr. QUAYLE (for himself, Mr. COBLE, and Mr. ROSS of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To impose certain limitations on consent decrees and settlement agreements by agencies that require the agencies to take regulatory action in accordance with the terms thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine for Regulatory Decrees and Settlements Act of 2012".

SEC. 2. CONSENT DECREE AND SETTLEMENT REFORM.

(a) APPLICATION.—The provisions of this section apply in the case of—

(1) a consent decree or settlement agreement in an action to compel agency action alleged to be unlawfully withheld or unreasonably delayed that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State or local governments—

(A) brought under chapter 7 of title 5, United States Code; or

(B) brought under any other statute authorizing such an action; and

(2) any other consent decree or settlement agreement that requires agency action that pertains to a regulatory action that affects the rights of private parties other than the plaintiff or the rights of State or local governments.

(b) IN GENERAL.—In the case of an action to be resolved by a consent decree or a settlement agreement described in paragraph (1), the following shall apply:

(1) The complaint in the action, the consent decree or settlement agreement, and any award of attorneys' fees or costs shall be published, including electronically, in a readily accessible manner.

(2) Until the conclusion of an opportunity for affected parties to intervene in the action, a party may not file with the court a motion for a consent

decree or to dismiss the case pursuant to a settlement agreement.

(3) In considering a motion to intervene by any party that would be affected by the agency action in dispute, the court shall presume, subject to rebuttal, that the interests of that party would not be represented adequately by the current parties to the action.

(4) If the court grants a motion to intervene in the action, the court shall refer the action to its mediation program or a magistrate judge to facilitate settlement discussions, which shall include the plaintiff, the defendant agency, and the intervenors.

(5) The defendant agency shall publish any proposed consent decree or settlement agreement for public comment before filing it with the court, allowing comment on any issue related to the matters alleged in the complaint or addressed or affected by the consent decree or settlement agreement.

(6) The defendant agency shall—

(A) respond to public comments received under paragraph (5); and

(B) when moving that the court enter the consent decree or for dismissal pursuant to the settlement agreement—

(i) submit to the court a summary of the public comments and agency responses;

(ii) certify the administrative record of the notice and comment proceeding to the court; and

(iii) make that record fully accessible to the court.

(7) The court shall include in the judicial record the administrative record certified by the agency under paragraph (6).

(8) If the consent decree or settlement agreement requires an agency action by a date certain, the agency shall, when moving for entry of the consent decree or dismissal based on the settlement agreement—

(A) inform the court of any uncompleted mandatory duties to take regulatory action that the decree or agreement does not address;

(B) how the decree or agreement, if approved, would affect the discharge of those duties; and

(C) why the decree's or agreement's effects on the order in which the agency discharges its mandatory duties is in the public interest.

(9) The court shall presume, subject to rebuttal, that it is proper to allow amicus participation by any party who filed public comments on the consent decree or settlement agreement during the court's consideration of a motion to enter the decree or dismiss the case on the basis of the agreement.

(10) The court shall ensure that the proposed consent decree or settlement agreement allow sufficient time and procedure for the agency to comply with chapter 5 of title 5, United States Code, and other applicable statutes that govern rule making and, unless contrary to the public interest, the provisions of any executive orders that govern rule making.

(11) The defendant agency may, at its discretion, hold a public hearing on whether to enter into the consent decree or settlement agreement. If such a hearing is held, then, in accordance with paragraph (6), a summary of the proceedings and certification of the hearing record shall be provided to the court, access to the hearing record shall be given to the court, and the full hearing record shall be included in the judicial record.

(12) The Attorney General, in cases litigated by the Department of Justice, or the head of the de-

fendant Federal agency, in cases litigated independently by that agency, shall certify to the court his or her approval of any proposed consent decree or settlement agreement that contains any of the following terms—

(A) in the case of a consent decree, terms that—

(i) convert into mandatory duties the otherwise discretionary authorities of an agency to propose, promulgate, revise or amend regulations;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commit an agency to seek a particular appropriation or budget authorization;

(iii) divest the agency of discretion committed to it by Congress or the Constitution, whether such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties; or

(iv) otherwise afford relief that the court could not enter on its own authority upon a final judgment in the litigation; or

(B) in the case of a settlement agreement, terms that—

(i) interfere with the agency's authority to revise, amend, or issue rules through the procedures set forth in chapter 5 of title 5, United States Code, or any other statute or executive order prescribing rule making procedures for rule makings that are the subject of the settlement agreement;

(ii) commit the agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question; or

(iii) provide a remedy for the agency's failure to comply with the terms of the settlement agreement other than the revival of the action resolved by the settlement agreement, if the agreement commits the agency to exercise its discretion in a particular way and such discretionary power was committed to the agency by Congress

or the Constitution to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.

(c) ANNUAL REPORTS.—Each agency shall submit an annual report to Congress on the number, identity, and content of complaints, consent decrees and settlement agreements described in paragraph (1) for that year, and any awards of attorneys fees or costs in actions resolved by such decrees or agreements.

SEC. 3. MOTIONS TO MODIFY CONSENT DECREES.

When a defendant agency moves the court to modify a previously entered consent decree described under section 2 and the basis of the motion is that the terms of the decree are no longer fully in the public interest due to the agency's obligations to fulfill other duties or due to changed facts and circumstances, the court shall review the motion and the consent decree de novo.

SEC. 4. EFFECTIVE DATE.

The provisions of this Act apply to any covered consent decree or settlement agreement proposed to a court after the date of enactment of this Act.

○

Mr. COBLE. Under the Administrative Procedure Act, stakeholders are protected by a set of rules that enable public notice of comment for proposed regulations. Another measure created by consent decrees is that there is typically no notice or public comment before a decree is approved, which is particularly disconcerting when the terms of the decree are pre-negotiated between the special interest groups and the Government.

When this occurs, the special interest is the only stakeholder with an opportunity to comment on the decree or know what is being negotiated. In addition, the special interest is also being reimbursed for its attorneys' fees by the Federal Government. I am not opposed to consent decrees, per se, but they should not replace or supplant our regulatory process.

These decrees cannot account for social changes or technological innovation, and their covert nature undermines the fundamental principles of our notice and comment rulemaking system.

I look forward to hearing from our witnesses today on these important and timely bills and reserve the balance of my time.

On the panel is the distinguished gentleman from South Carolina, Mr. Gowdy; the distinguished gentleman from Arizona, Mr. Quayle; and to my left, the distinguished gentleman from Michigan, Mr. Conyers. Did you want to be heard on opening statement?

Mr. CONYERS. Yes, Mr. Chairman——

Mr. COBLE. And John, if you would suspend for a minute?

I am told there is going to be votes on or about 10:30 a.m. So we will try to move it along as quickly as we can rather than hold you all up as well.

The gentleman from Michigan?

Mr. CONYERS. Thank you, Chairman Coble.

And I am pleased to be here this morning. To notice that we are taking up not one bill, but two bills, and I assume there is some relationship between the two that I would like to hear about as the hearing goes on. Because the second bill was only introduced on Wednesday of this week in the evening, which I think would hardly give the Members or the witnesses an opportunity to make some evaluation of it.

So I am trying to understand what makes legislating on Federal consent decrees an important measure, and then we add to it a bill called the Sunshine for Regulatory Decrees and Settlements Act. These bills, I think, may undermine a key tool in guaranteeing the rights and protections that we have enacted for a long while, and in some ways, they may be very harmful to civil rights considerations and environmental law considerations because the consent decree, of course, is a voluntary settlement between the plaintiffs and defendants entered by a court and enforceable by judicial orders of the court.

They are used frequently, and I haven't heard any particular objection to them or abuse that requires our examination of Federal legislation modifying the rules that surround them right now.

So I would like to point out that the major bill, 3041, could have the effect of virtually eliminating consent decrees against State and local governments by imposing unworkable time limits on them. This could present a very—this would worsen the utilization of consent decrees, not improve it.

And so, it seems to me that there may be a motive to prevent Federal regulatory actions from being implemented in 3862. It would needlessly slow down the process by which consent decrees are entered.

So I think Rule 60 requires a court to revisit its decrees when changed circumstances merit modifying or even terminating such a decree. The Supreme Court has spoken on this in *Frew v. Hawkins,* that Federal courts must be deferential to State and local government prerogatives when considering whether a consent decree should be modified.

And so, I think Attorney General Edwin Meese some three decades ago, and I haven't praised his services recently, but I think he did set forth the guidelines to determine whether or not to enter in consent decrees and settlements.

So I thank you for the opportunity to view these ideas and hope that any members of the panel that would like to comment to them as we proceed would please do so.

Thank you, Chairman Coble.

Mr. COBLE. I thank the gentleman.

And I will say, Mr. Conyers, that drafts of the bill were made available I think on Sunday to the minority and also I think to the witnesses as well. Is that right, Daniel?

We have been joined by Mr. Johnson. He is the distinguished gentleman from Georgia.

And we will proceed as planned. I will introduce our panel of outstanding witnesses initially. Mr. Roger Martella is a partner of the environmental practice group of Sidley Austin LLP. He recently rejoined Sidley Austin LLP after serving as the general counsel of the United States Environmental Protection Agency, concluding 10 years of litigating and handling complex environmental and natural resources matters at the Department of Justice and EPA.

Mr. Martella's practice focuses on three primary areas. First, he advises companies on developing strategic approaches to achieve their goals in light of rapidly developing demands to address climate change, promote sustainability, and utilize clean energy. Second, Mr. Martella handles a broad range of environmental and natural resources litigation and mediation. And finally, Mr. Martella advises multinational companies on compliance with environmental laws in the United States, China, the European Union, and other nations.

Mr. Martella is a graduate of the Cornell University and the Vanderbilt University School of Law.

Mr. Schoenbrod teaches environmental law at New York Law School and is the visiting scholar at the American Enterprise Institute. He has served as a senior staff attorney for the Natural Resources Defense Council, where he was instrumental in efforts to remove lead from gasoline. He is a pioneer in the field of environmental law and is currently examining how Congress could restructure environmental statutes so that their objectives can be achieved more effectively and efficiently.

Professor Schoenbrod studies all major environmental areas. He also studies litigation in which court decrees dictate the management of governmental institutions such as prisons, schools, and foster care agencies. After receiving a bachelor's degree from Yale,

Professor Schoenbrod was a Marshall Scholar at the Oxford University and later received an LLB also from Yale.

Mr. Andrew Grossman is a visiting legal fellow in the Heritage Foundation's Center for Legal and Judicial Studies, where he researches and writes about law and finance, bankruptcy, national security law, and the constitutional issues of separation of powers.

Outside Heritage, Mr. Grossman is a litigator in the Washington office of the global law firm Baker and Hostetler. He also represents States in challenges to the constitutionality of Federal statutes and the legality of Federal environmental regulations.

He also is active in commercial litigation and received a bachelor's degree in economics and anthropology from Dartmouth College, a master's degree in government from the University of Pennsylvania, and a J.D. from the George Mason University School of Law.

Finally, Mr. John Cruden is the fourth president of the Environmental law Institute (ELI). Mr. Cruden joined ELI after serving at the U.S. Department of Justice, where he served as Deputy Assistant Attorney General, Environmental and Natural Resources Division, a position he has held since 1995.

At the Department of Justice, Mr. Cruden supervised Federal civil environmental litigation involving agencies of the United States and oversaw the Environment Section and Environmental Defense Section. He has personally litigated and led in settlement negotiations in numerous environmental cases, many with reported decisions. He also has led the Department of Justice delegations to international environmental conferences.

Mr. Cruden is a graduate of the United States Military Academy, University of Santa Clara, and the University of Virginia.

We are blessed with an outstanding panel, and good to have you all with us. Gentlemen, we try to comply with the 5-minute rule. There is a timer on your panel there that will go from green to yellow to red. When the yellow—amber light appears, that is your warning that you have a minute to go, and the ice on which you are skating is becoming thinner and thinner.

But you won't be punished if you violate it, but if you could wrap up within 5 minutes, we will be appreciative to you.

Mr. Martella, why don't you start us off?

If you will suspend, Mr. Martella, we have also been joined by the distinguished gentleman from North Carolina, my colleague Mr. Mel Watt, and Mr. Ross from Florida has joined us as well.

Mr. Martella, you are recognized for 5 minutes.

Mr. Martella, pull that mic a little closer or else it may not be activated. I don't think your mike is activated.

TESTIMONY OF ROGER R. MARTELLA, JR., SIDLEY AUSTIN LLP

Mr. MARTELLA. Oh, is it working now? Thank you. Can you hear me?

Again, good morning, Chairman Coble and Members of the Subcommittee. Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing is critically important because it raises issues about fairness, transparency, and public participation in administrative rulemakings while providing a mechanism for the

executive branch to ensure sound and principled decision-making in this very litigious environment that we all inhabit.

The focus of my testimony today is going to be on the Sunshine Act.

By way of background, I am a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, including at the Justice Department and as the general counsel of the EPA. I have also served and continue to serve with several environmental nongovernmental organizations.

I would like to start with the uncontroversial proposition that rulemaking activity is built upon three bedrock principles of transparency, public participation, and judicial review. The Administrative Procedure Act guarantees these principles and protections for all citizens when the Government engages in rulemaking.

However, the APA is confronting new challenges that in some cases are bypassing these important protections. Today, I want to share with you my concern about recent efforts to circumvent these protections in an emerging phenomenon I call "off ramp settlements" because they provide an off ramp to transparency, public participation, and judicial review.

The concern arises out of a growing trend where certain groups increasingly are employing a sue and settle approach to the Government on regulatory issues. Such an approach effectively provides an off ramp that ignores these bedrock principles, including a lack of transparency.

In off ramp settlements, discussions and agreements typically are reached with a subset of interested parties without full stakeholder input and frequently take place outside the boundaries of the public process.

A lack of public participation. In most off ramp settlements, public participation is foreclosed twice.

First, the agreement on how to regulate is reached without full input of stakeholders that are affected. Second, the negotiated deadlines for final rules are frequently so quick that the public's comments might receive little weight in the actual subsequent rulemaking.

A lack of judicial review. In off ramp settlements, parties frequently reach an agreement before a lawsuit is even filed, thus depriving interested parties from intervening in the litigation to defend their interests. Even where settlement occurs after intervention, such parties have little to no opportunity to participate in the settlement discussions.

And finally, a conflation of governmental and nongovernmental roles. In these settlements, the plaintiffs effectively set the priorities and the timelines for how the Government enacts certain rulemakings over other competing resources and concerns. These concerns regarding off ramp settlements are not theoretical or abstract, but have been rising with increasing frequency in the last several years and are referred to by some of the plaintiffs themselves as "mega settlements."

Two recent examples include endangered species consultations where last year the Fish and Wildlife Service and certain groups filed joint settlement agreements committing the services to take

action regarding 600 species during fiscal years 2011 and 2012. And also greenhouse gas new source performance standards, where in December of 2010 EPA announced a consent decree with several groups committing the agency to propose and finalize the first-ever new source performance standards for greenhouse gases without any prior input from the affected stakeholders.

EPA specifically proposed to have the first proposals in July of 2011, 6 months after the consent decree, which was an unprecedented quick schedule the agency already has missed.

Thus, the off ramp settlement approach risks the transparency, public participation, and judicial review protections Congress has established for all stakeholders in rulemakings. However, elements of the sunshine bill before the Subcommittee today could help ensure that these public protections remain in effect, while preserving the Government's broad discretion to enter into settlement agreements in the first place.

Specifically, provisions of the sunshine bill proposal would require transparency by providing a process for affected parties to be notified of proposed agreements so that such parties can assess whether to intervene. In environmental decision-making, transparency is a good thing not to be feared or avoided.

The sunshine bill would provide public participation by allowing comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments, and the court would assess whether the subsequent rulemakings allow adequate time for real public comment once the rulemakings commence.

The sunshine bill would enable judicial review by providing for intervention prior to the finalization of an agreement. In addition, the proposal provides the opportunity to bring interveners to the settlement table to contribute ideas through a mediation process, and the sunshine bill would affirm the priority-setting discretion of agencies by requiring certifications on the creation of new mandatory duties.

In conclusion, these key principles, promoted in the proposed Sunshine Act, will hopefully bring little controversy. The measure would preserve the ability of the Government to seek efficient settlement agreements with its full discretion while assuring along the way that information is shared, the public has an ability to participate and be heard, and that the views of the parties that could be adversely affected are considered by the agency and the court.

Thank you again for the opportunity to share my views on these important proposals. I would be happy to answer any questions.

[The prepared statement of Mr. Martella follows:]

Addressing Off Ramp Settlements:
How Legislation Can Ensure Transparency, Public Participation, and Judicial Review in Rulemaking Activity

Roger R. Martella, Jr.
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Chairman Coble, Ranking Member Cohen, and Members of the Subcommittee:

Thank you for providing me the opportunity and the honor to appear before you today.

The subject of today's hearing on the Sunshine for Regulatory Decrees and Settlement Act and the Federal Consent Decree Fairness Act is critically important because it raises issues about fairness, transparency, and public participation in administrative rulemakings while providing a mechanism for the Executive Branch to ensure sound and principled environmental decision making in this very litigious environment we all inhabit. I commend the Subcommittee for addressing this issue at a critical time, and look forward to assisting your efforts.

It may not be a mandatory subject in law school, but America's successful use of administrative law and rulemaking is critical to implementing the laws that you enact. We should agree that essential hallmarks of administrative law have always included the bedrock principles of: (1) transparency in government action; (2) the solicitation of public and stakeholder input prior to final government action; and (3) opportunities to ensure equal access to judicial review by all parties impacted by government action. But the Administrative Procedure Act originally adopted by Congress in 1948 is confronting new challenges in this era where every significant administrative law initiative seems to be comprised of three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking. I do not think we can or should endeavor to change those components of modern life in Washington, but it is appropriate and timely that this Subcommittee is focusing on the growing problems regarding settlements of administrative law litigation that bring a new layer of complexity to the ability of the public to participate in the rulemaking process. Key elements of the proposed legislation subject to this Hearing today are critical to ensuring that our democratic rulemaking processes maintain the principles associated with enactment of the APA in 1948. Today, I want to share with you my concern about recent efforts to circumvent such protections in an emerging phenomenon that I call "off ramp settlements."

By way of background, I am both a lifelong environmentalist and a career environmental lawyer. I am very proud to have spent the majority of my career in public service, as a trial attorney in the Justice Department's Environment Division, as the General Counsel of the United States Environmental Protection Agency, and as a judicial law clerk on the Tenth

Circuit Court of Appeals. In my current capacity as a private practitioner, I am privileged to work with a plethora of stakeholders including private companies and trade associations, environmental organizations, and the government, to develop creative solutions that advance environmental protection while also enabling the United States to retain economic competitiveness in a trade sensitive, global environment where very few economies provide even the faintest glimmer of our own environmental controls and public process protections. In both my government and private careers, I am very proud of the opportunities I have had to participate in and advance international rule of law initiatives, working to help develop the enactment of environmental and public participation laws in growing economies. But now it is time to turn to our own laws, and to discuss your efforts to address the recent threats to their effectiveness.

In my opportunities to explain and teach the American environmental protection regime in China and elsewhere, I always begin with the simple proposition that substantive environmental law is inextricably intertwined with the core process concepts of transparency, public participation, and judicial review. Although it was Congress that took the initiative in the 1970s to enact the suite of environmental laws that continue to provide Americans with the cleanest environment in the world, the success of environmental protection is ultimately attributable to a wide range of actors, including the implementation of the Executive Branch through rulemakings and the rigorous scrutiny of the Judicial Branch. Again, the APA is our benchmark and its preservation is our goal.

But especially in environmental matters, we must look beyond the government and recognize that just as key to the success of our environmental regime has been the role of a myriad of stakeholders and public citizens who have taken part in advancing environmental protection. This includes multinational companies developing novel environmental solutions and technologies, and also encompasses local and national environmental organizations that participate in rulemakings impacting public health Ultimately, when a rulemaking is concluded with full public input and participation and any of these parties, including private citizens, invoke the courts to address environmental concerns, the success of environmental protection in the United States is ensured because of the broad roles played by actors outside the government as much as the role played by the government itself.

Key among the parties contributing to the success of environmental laws are environmental nongovernmental organizations, or NGOs. Decades prior to the enactment of environmental laws, these groups drove the environmental movement in the United States in response to issues such as protecting wilderness areas and addressing Love Canal, the Cuyahoga River, and smog in our nation's urban areas. In my experience, the advancement of environmental protection frequently has been synonymous with efforts by such NGOs. I am personally proud of the opportunities I have had to serve with several NGOs and my experiences with NGOs in various capacities reinforces the strong role they play in

advancing environmental protection.

At the same time I believe that a subset of NGOs recently has added a new and unanticipated weapon in an unfortunate effort to conflate the respective roles and boundaries of governmental and nongovernmental organizations. This approach, if not carefully considered, can risk the core principles of transparency, public participation, and judicial review. Specifically, certain groups increasingly are employing a "sue and settle" approach to interactions with the government on regulatory issues. Before going further, let me be perfectly clear about my views: while the general notion of settling disputes with the government is noncontroversial and properly serves as a key component of promoting judicial efficiency and reasonable outcomes to disputes, such an approach takes on new concerns in a regulatory context when such settlements effectively provide an off ramp that ignores these various protections, procedures, and boundaries Congress has established. Specifically, such off ramp settlements implicate the following issues:

- **The opportunities for non governmental actors to engage in a quasi-governmental role:** Frequently, when NGOs engage in settlements with administrative agencies over rulemaking schedules, the outcome is a reallocation of government priorities, resources, and deadlines. Effectively, in such settlements the NGO plaintiffs and petitioners, and not the government officials entrusted to the effective implementation of the laws, can set the priorities and timelines for how the government enacts certain rulemakings over other competing concerns and resources. A well established line of case law makes it clear that ultimately the government has wide deference and discretion in setting its own regulatory schedule, particularly when Congress has not mandated a given deadline. However, in these off-ramp settlements, the NGOs typically gain agreements instead of allowing a Court to address the merits of such arguments. In those circumstances, such settlements can impose obligations on the government that the Court unlikely would have compelled. Such a quasi-governmental role is not only inconsistent with the respective dividing lines between governmental and nongovernmental functions, but, critically, also threatens to distract the government's limited resources away from other important priorities, contributing to a cycle of the government unable to meet other obligations and priorities. Further, as described below, experience has shown that such settlements have resulted in unrealistic commitments of government resources that the government is not capable of meeting. These missed deadlines in turn lead to litigation to enforce such deadlines, thus entailing the further engagement of the Court in a cycle that violates every notion of why judicial settlements make sense..

- **Lack of transparency:** A core element of American environmental rulemaking that is distinguishable from almost every other system in the world is the promise and guarantee of transparency. The Administrative Procedure Act, the Clean Air

Act, and many other laws mandate notification to the public and stakeholders of rules and decisions impacted by such governmental actions. Such affected and interested stakeholders, along with other members of the public, have an opportunity and a right for adequate notice and comment. Not only must this opportunity precede any final agency action, but also the government is compelled by the APA to publically respond to and take into account comments and defend its final rule from issues raised that are not substantively addressed. These laws permit only the narrowest of exceptions to waive such processes, and the agencies appropriately have exercised restraint in invoking such exceptions. Similarly, on the rare occasions when the government takes action without providing adequate transparency, notice, and public participation, Courts have been rigorous in their enforcement. Sue and settle consent decrees, however, effectively provide an off ramp to these critical procedural protections. Such discussions and agreements typically are reached with a subset of interested parties without full and broad stakeholder input, and in many instances take place outside the boundaries of the public process.

- **Lack of effective public participation:** In most off ramp settlements, even when the government provides some opportunity for comment after an agreement is reached, experience has shown that in many instances such process is pro forma, with at most minor changes to deals made in rare circumstances. In addition, the negotiated deadlines for final rules are frequently so quick and ambitious that the public's comments might receive little weight in the actual subsequent rulemaking due to artificially imposed time constraints. Thus, public participation is foreclosed essentially twice—at the settlement and the rulemaking stages—leading to final agency action that circumvents the intended role of stakeholder input and fails to account for broader views.

- **Lack of judicial review:** Another core tenet of environmental rulemaking in the United States is the ability both to challenge rulemaking decisions adversely impacting stakeholders and to participate as intervenors—frequently, in defense of the government's decisions in priorities—in the litigation of rule challenges brought by other parties. Congress guaranteed such protections both by affirmatively waiving the government's sovereign immunity to rulemaking challenges in laws like the Administrative Procedure Act and by providing explicit causes of action under the APA or, for example, the Clean Air Act. However, in off ramp settlements, NGOs and the government may reach an agreement before a lawsuit is even filed, thus depriving interested parties and potential intervenors from participating in the negotiations or intervening in the litigation to defend their interests. Even where settlement occurs later, after parties may have been granted intervention by demonstrating they may be adversely impacted by the outcome of a lawsuit and may not be adequately represented by the government, such parties have little to no opportunity to participate in settlement discussions to which they are not invited by

the government and NGOs. Thus, settlements in a regulatory context can adversely impact the interests of interested parties while depriving them of meaningful judicial review.

These concerns regarding off ramp settlements are not theoretical or abstract, but have been rising with increasing frequency in the last several years. In fact, they have become so common that some groups have labeled the phenomenon of reaching an enforceable agreement with the government on regulatory commitments and shifting of resources as "mega settlements." Some recent examples include:

- **Endangered Species Consultations:** In May and June 2011, the Fish and Wildlife Service and certain NGOs filed joint settlement agreements in U.S. District Court to resolve claims that sought to mandate listing decisions on more than 600 species. The settlements specified certain actions the Service is to take regarding 600 species during FY 2011 and FY 2012, including the commencement of a review of 251 candidate species in a five year period, resulting in 130 decisions by September 30, 2013 alone. The Court approved and enforceable settlements, which were negotiated absent participation from stakeholders who ultimately will be impacted by the listing decisions, are raising significant questions about the Agency's resources and ability to meet the deadlines and commitments in a manner that entails adequate public participation and promotes sound decision making.

- **Greenhouse Gases Performance Standards:** On December 23, 2010, EPA announced a consent decree with several NGOs committing the agency to propose and finalize the first ever New Source Performance Standards for greenhouse gases. EPA agreed to promulgate such standards for utilities and refineries without any prior input from stakeholders in those industries. Specifically, EPA committed to propose the first-ever GHG NSPS for these sectors in July and December of 2011, which is an unprecedented quick schedule. In fact, the schedule was so ambitious that six months after the July deadline, the Agency has yet to propose the standards for either sector. Beyond the mere commitment of schedules and timelines, EPA also made various substantive commitments in the agreement that would ordinarily be open for public comment in a rulemaking process, such as a decision to regulate both new and existing sources in these categories, without prior industry input on the feasibility of such controls, the ability to implement in a timely manner, and the lack of adequate data to create such standards. Although the Agency ultimately held listening sessions and took comment on the agreements after finalizing them, the agreements did not materially change before being lodged with the Court.

- **Water:** Recently, Chairman John L. Mica, Chairman Bob Gibbs, and Ranking Members James. M Inhofe and Jeff Sessions raised similar concerns regarding two off ramp settlements in the water context. In a January 29, 2012 letter to the

> Environmental Protection Agency, they pointed to examples of Clean Water Act settlements as demonstrating a "trend recently, whereby EPA has been entering into settlement agreements that purport to expand Federal regulatory authority far beyond the reach of the Clean Water Act and has then been citing these settlement agreements as a source of regulatory authority in other matters of a similar nature."

While the long history of NGO achievements has been essential to the success of environmental protection, there is significant doubt about whether recent off ramp settlements have truly realized better environmental outcomes. From an outsider's perspective, it certainly appears that these agreements have both disrupted and displaced the government's authority to prioritize its resource and rulemaking agendas. In many if not most instances, the government deadlines and commitments are unrealistic and not realistically capable of being met, as demonstrated by the missed NSPS deadlines above and the unprecedented scope of the endangered species consultation commitments. Meanwhile, the reallocation of resources to the agenda set by outside parties comes at a cost of other priorities, deadlines, and goals for the environment. This unfortunately is a pattern capable of repetition, as groups then initiate litigation to challenge missed deadlines in the settlement agreements all while bringing new actions to create new enforceable deadlines, further constraining the ability and discretion of the Agency to advance its own agenda.

Beyond these substantive concerns, the off ramp settlement approach in the rulemaking context potentially risks greater consequences to the protections Congress established for all stakeholders in environmental rulemaking. Transparency, public participation, and judicial review are the bedrock principles in our rulemaking system that should be provided equally for all parties. Congress should guarantee these protections remain not only to ensure the strongest possible environmental rulemakings, but to uphold the essential democratic process for providing public input and participation into such rulemakings.

Elements of the proposed Bills that are the subject of this hearing could help ensure that these public protections remain in effect in rulemaking challenges while preserving the government's broad discretion to enter into settlement agreements and consent decrees when agencies deem such agreements to be in the government's best interest. Specifically, regarding the Sunshine for Regulatory Decrees and Settlements Act:

- **Requiring transparency:** The proposed Bill provides a process by which affected parties would be notified of proposed settlement agreements and consent decrees, so that such parties can assess whether to intervene in related litigation and participate in commenting on the agreement. I think most if not all would agree that in environmental decision-making, transparency is a good thing, not to be feared or avoided.

- **Providing public participation:** The proposal would memorialize a process where agencies would be required to publish any applicable proposed consent decree or settlement agreement for public comment, and allow comment on any issue related to the matters alleged in the complaint or addressed in the proposed agreement. Government agencies would be required to respond to comments as they do with other regulatory actions and provide a summary and record to the Court of the comments and concerns that have been raised by all affected parties, not just the parties to the agreement. If the initial rule is required by the APA to be surrounded by all this procedural panoply, a settlement agreement that could partially vitiate that rule should get the same procedural protections.

- **Enabling opportunities for judicial review:** The proposed Bill facilitates the participation of affected parties and stakeholders before the Court by providing an opportunity for intervention prior to the finalization of an agreement. In addition, the proposal provides the opportunity to bring intervenors—those parties whom the Court necessarily has deemed have an interest that could be adversely affected by the litigation—to the settlement table to contribute ideas, interests, and solutions through a mediated process.

- **Affirming the priority setting discretion of agencies:** Finally, the proposal has a number of provisions intended to ensure that the government, prior to the approval of an agreement or consent decree, can meet the commitments made in any agreement without disrupting other key priorities and allocations of resources. For example, the measure would enable courts to assess whether the agreement allows sufficient time and procedure for the agency to comply with procedural protections relating to public participation in related rulemakings. The provisions requiring certifications to the court on the creation of new mandatory duties through agreements, the expenditure of unappropriated funds, and the divestment of agency discretion may encourage more principled agreements with realistic expectations. And the modification provision would aid the government in seeking modifications to agreements whose implementation jeopardize the public interest when considered against changed facts or circumstances or other pressing mandatory duties.

These key principles promoted in the proposed Sunshine for Regulatory Decrees and Settlements Act will hopefully bring little controversy. The measure would preserve the ability of the government to seek efficient settlement agreements while assuring along the way that information is shared, the public has an ability to participate and be heard, and that that the views of parties that could be adversely affected are considered by the Agency and the Court. Although some may find it inefficient to bring presumably adverse parties together in a mediation program, in my experience the opposite is true. The opportunity and ability to reach compromise prior to an agreement with all interested stakeholder input

only increases the likelihood of an agreement that is long lasting, effective at realizing its intended goals, and responsive to a wide range of issues and solutions.

Thank you for the opportunity to share my views in these important proposals. I would be happy to answer any questions.

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Mr. COBLE. Thank you, Mr. Martella.
Mr. Schoenbrod, you are recognized.

TESTIMONY OF DAVID SCHOENBROD, TRUSTEE PROFESSOR OF LAW, NEW YORK LAW SCHOOL, VISITING SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

Mr. SCHOENBROD. Chairman Coble, Members of the Committee—I thought I pressed the button. Do you hear it now? Okay.

Thank you for the opportunity to be here today and testify.

I am going to focus my comments on the Federal Consent Decree Fairness Act. The objective should be for Federal courts to enforce rights effectively, but in a way that intrudes as little as possible on the power of elected officials to make policy.

But that is not what we have today. We have thousands of decrees against State and local government in Federal courts. Many of these decrees last for a very long time, and it is very hard for State and local officials to get the decrees changed, even though many of the well-intentioned ideas built into these highly detailed decrees prove to have unintended consequences.

And I know that as a former plaintiff's lawyer myself. They often fit badly with changing circumstances, and they are often contrary to the priorities that constituents expressed in new elections.

State officials need to be able to modify the decree, but in a way that still protects rights. And that is not possible under current court rules, even though there is language from the Supreme Court that says that should be the case.

We need Congress to step in to create a new rule, and the Federal Consent Decree Fairness Act is the right new rule. It is right in three particular ways. The timing for a motion to change the decree is right, the standard for changing the decree is right, and the burden allocation is right.

As to the timing, the defendants are allowed to make a motion to change the decree in sync with the election cycle. That is the right timing in a democracy.

Second, the standard for changing the decree is whether the rights would still be protected, and that is the right standard in a constitutional democracy where we care about protecting rights.

The burden. The burden is placed on the plaintiffs to show the decree is still needed to protect the rights. That is the right allocation of burden. Otherwise, defendants have to prove a negative, and courts customarily place the burden on plaintiffs who want courts to stop elected officials from making policy.

It is true that in these consent decrees some defendant Mayor or Governor once consented to the entry of the decree, but it is wrong to presume that the decree is still the right policy choice for the current Mayor or Governor elected in a subsequent election, especially, especially when the rights being enforced as popular rights. And we know they are popular rights because almost all these decrees are enforcing statutes enacted by Congress because constituents think they are a good idea.

The burden should be on the plaintiff to show the decree is still needed. And if the plaintiffs can show that, then the decree should remain in force.

Now it has been asserted that this Federal Consent Decree Fairness Act would prevent the continued use of consent decrees. I think that is just wrong.

First of all, there are major, major incentives for litigants to adopt consent decrees. Current court rules say that if there is not a consent decree, the judge is strictly limited in what could be put into a decree. The judge has to hew very closely to rights. With a consent decree, the decree could go much more broad than that, cover other material.

Beyond that, the consent decree provides a way of rapidly getting a change rather than waiting for years of litigation. It reduces the uncertainty that comes from litigation and appeals. It means the plaintiffs' attorneys get their attorney fees more rapidly. And beyond that, there is the right under the statute for the plaintiffs to show the decree is still needed.

So the idea that this statute, this bill would prevent the use of consent decrees I think is simply wrong.

A final point I would like to make is it seems to me that there is a special need for Congress to act in this matter now. Most of these decrees are to enforce statutes that Congress has enacted in areas like foster care and health and other matters. Most of these statutes give the States very wide discretion in how they implement them.

However, the decrees take that discretion away. That discretion is needed because elected officials of the State and local government need the ability to adapt what they are doing to changing circumstances, to what has been learned. And that need for flexibility is especially important today when so many States and localities are in fiscal difficulty, and they need to find creative ways of doing what voters need better, faster, cheaper.

And these old, ancient decrees, the thousands of them, many hundreds of pages long—and I myself, as a plaintiff lawyer, have drafted those decrees—put glue in the mechanism of government to adapt to change.

[The prepared statement of Mr. Schoenbrod follows:]

Statement of

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&

Ross Sandler
Director, Center on New York City Law, New York Law School
Professor, New York Law School

before the

Subcommittee on Courts, Commercial and Administrative Law
of the
House Committee on the Judiciary

on the

Federal Consent Decree Fairness Act
&
Sunshine for Regulatory Decrees and Settlements Act

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The views expressed in this testimony are those of the authors alone and do not necessarily represent those of New York Law School or the American Enterprise Institute.

Chairman Coble, Ranking Member Cohen, Members of the Subcommittee, thank you for inviting us to testify today.

Federal Consent Decree Fairness Act

Senator Lamar Alexander, the initiating sponsor of the Federal Consent Decree Fairness Act, stated that it was based on our book, *Democracy by Decree: What Happens When Courts Run Government* (Yale University Press, 2003).

Our book is in turn based upon four premises.

I. The people have individual rights, constitutional and statutory, that courts should effectively enforce.

II. The people also have a collective right to elect state and local officials with the power to make government policy.

III. When necessary to enforce individual rights, courts should be able override the policy choices of these democratically-elected state and local officials.

IV. However, in enforcing rights, courts should intrude as little as possible on the policy choices of these elected officials.

A year after the book came out, a unanimous Supreme Court made the same points when it wrote:

> If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers. . . . A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441-442 (2004).

Why there is a problem

Despite the Supreme Court's dicta in *Frew*, the everyday reality is that private litigants in federal court do use consent decrees to intrude on policy making of elected state and local officials far more than necessary to protect rights. The decrees are entered by consent after being negotiated and drafted by the plaintiffs' attorneys, defendant officials, and government attorneys.

Each has ideas about how to improve the program that is the target of litigation. Through horse trading, this group constructs a detailed plan to change the government program that is target of litigation. Each member of this controlling group has reasons to consent to a decree broader than needed to protect rights that gave rise to the suit. Plaintiffs' attorneys get to turn their policy preferences into court orders. The unelected officials who operate the program under reform get to broaden their power and grow their budget by court order, thus trumping the prerogatives of governors, mayors, or legislatures.

Governors and mayors have own reasons to go along with the deal negotiated by the controlling group. Contested litigation makes them a target of criticism, while the consent decree lets them take credit for a solution. The consent decree can often be constructed so that the most onerous requirements fall due are after next election. The Supreme Court, citing our book in *Horne v. Flore,* wrote that

> Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. . . . ("Government officials, who always operate under fiscal and political constraints, `frequently win by losing'" in institutional reform litigation). 129 S. Ct. 2579, 2594 (2009).

Judges understandably sign the consent decrees because no one objects and otherwise they will have to write the decrees themselves, which would mean the judges themselves would have to make the policy choices.

The problem comes chiefly because the consent decree binds not only the elected officials who consented to the decree, but also their successors in office, who find it hard to change the policy embedded in court orders by their predecessors. Court rules applied in consent decree cases against government official have a common origin with rules applied in consent decree cases against private business officials. The cases against private business officials are, however, different because there is no need to take account of the people's right to elect policy makers.

In response to this difference, the Supreme Court in *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367 (1992) allowed government defendants to get a decree modified if they could show changed circumstances. This adjustment has proved in practice to be wholly inadequate, as illustrated by *Escalera v. New York City Housing Authority*, 924 F.Supp. 1323 (S.D.N.Y. 1996). The litigation began in 1967 with a class action complaint that the New York City Housing

Authority failed to give adequate procedural due process to tenants who were delinquent. The consent decree negotiated in 1971 mandated the elaborate procedures that went well beyond the requirements of due process. In 1993, after crack cocaine had emerged as a serious issue and caused great violence and fear in public housing, individual tenants demanded that the Housing Authority promptly evict those tenants who dealt drugs from their apartments. It complied by invoking a special procedure available under state law that would allow rapid eviction of proven drug dealers. The procedure complied with due process, but the Legal Aid attorneys who had brought the original class action objected that the procedure violated the twenty- two year old consent decree. To oppose lawyers technically representing them as tenants, the elected leaders of the tenants association hired other lawyers to fight on the side of the Housing Authority. It took two years of intensive litigation before the judge ruled that the decree could be modified under *Rufo*. Meanwhile, the tenants, the purported beneficiaries of the old decree, lived with the danger and intimidation of drug dealers next door.

Rufo is inadequate, in part, because it limits modification of decrees to changed circumstances. That approach denies voters their right to elect officials who can change policy simply because a new policy is thought to be a better policy. As Justice William Brennan wrote:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days. . . . [N]othing would so jeopardize the legitimacy of [our] system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts. *U.S. Trust Co. v. New Jersey,* 431 U.S. 1, 45 (1977) (Brennan, J., dissenting).

The Supreme Court acted upon this principle in *Horne v. Flores*, where it held in effect that state officials could change policy quite apart from changed circumstance, so long as the new policy complies with federal rights.

It was hoped that *Frew* and *Horne* had solved the problem of antique decrees frustrating the ability of newly-elected officials to change government policy in light of experience and the changing wishes of voters. This hope has, however, been dashed. In fact, less than thirty reported cases since *Horne* invoke the Court's opinion in dealing with motions by state and local officials

to change a consent decree. There may be some additional motions adjudicated in unreported opinions, but experience suggests that these Supreme Court cases has left untouched the vast majority of the many thousands of consent decrees against state and local government.

One difficulty is that *Horne* did not provide a clear roadmap for changing decrees. To the contrary, the Court found itself divided 5-4, the divisions were on a multitude of issues, and the resulting opinions are complicated and long – almost 26,000 words in total. The lack of a clear roadmap is a product of the Court's nature as a collective body obligated to decide cases based upon an inventory of precedent. Under that precedent, securing a modification is a time consuming process. For example, although *Horne* itself went back to the district court in 2009, discovery and hearings have dragged on and the lower court has yet to decide the motion.

Congress, in contrast, can write a clear, prospective rule.

Why the Federal Consent Decree Fairness Act is the right rule

In response to the need to modify and terminate consent decrees in light of both changing circumstances and changing policy, the bill provides a procedure that protects plaintiff's rights while still deferring appropriately to the choices made by state and local officials. The bill sets out the timing of motions, the burden of persuasion, and the standard to be applied.

Timing: Elections provide the public an opportunity to assess past policies and official competence and to democratically signal the need for changes. Consent decrees, however, typically last longer than the terms of the officials consenting and have the anti-democratic effect of limiting choices of newly elected officials. Long term contracts constraining the choice of newly elected officials undermine the core purpose of regular elections of officials, as Justice Brennan noted. The bill explicitly acknowledges the state and local election cycles and permits the newly elected or re-elected officials to move to modify or terminate the old consent decree as a function of the election process.

Burden: The justification for continuing a consent decree is that it is still needed to prevent future violation of federal constitutional or statutory rights. Current law places the burden on the state or local official to prove a negative – that the decree is no longer needed.

Placing this burden on the state or local officials is wrong as a practical matter because it is an almost impossible burden under most of the decrees, which enforce federal statutes on education, mental health, child protection and the like. The nature of governmental duties with

respect to such programs are such that they can never be perfectly performed or shown to be totally without risk of failure. Placing the burden of disproving the likelihood of future violations on the state and local officials is a formula for perpetual court supervision. This has happened in every state. Consent decrees of 30 and 40 years of age are common.

Placing this burden on the state or local officials is also wrong as a matter of principle. The core constitutional principles of separation of powers and federalism require judges to place the burden on plaintiffs who assert that a government official threaten them with illegal harm before entering an order against the official. In many institutional reform cases, plaintiffs never need to shoulder this burden because the official consented to be bound by a decree, but their successors in office have not. In other institutional reform cases, plaintiffs did prove that an official then in office did threaten illegal harm, but have not shown that their successors in office would. Imputing the threat from predecessor officials to their successors makes no sense, especially when the consent decree enforces statutes with broad majoritarian support. Most consent decrees today enforce statutes that Congress passed because voters favor the statute's purpose.

The burden of persuasion is defined as the risk of non-persuasion. In this case the burden should be on the plaintiff to show that the decree is still needed to vindicate plaintiff's rights. But once the plaintiff has made a prima facie showing that the decree or parts of the decree are still needed, the state or local government would have to respond. This allocation of burden and response has litigation efficiency. The focus of the litigation sticks to the statutory or constitutional right at issue rather than on the bargains written into consent decrees often years and decades earlier. Secondly, a state or local official who cannot respond persuasively to the plaintiff's proof, ought to lose and, under this statute, will lose.

Standard: the Supreme Court in *Frew* ruled unanimously that the federal courts should defer to the choices made by state and local officials. As shown by *Horne*, this includes policy choices on how best to comply with federal requirements. *Horne* involved federal requirement for the teaching of English to non-English speaking children. The issue in the case involved the best method of achieving that goal. The bill sets the standard in terms of allowing officials to make policy choices so long as they comply with the underlying constitutional and statutory requirements.

A legitimate concern of plaintiffs is that a state or local government may take years to come into compliance with federal law, and that the time may well exceed the fixed terms of the elected officials initially sued. Plaintiffs have a legitimate concern that their rights not be lost due to administrations change; the bill protects the plaintiffs from that risk.

With respect to modifications, the baseline applicable to all consent decrees is federal law. No modification sought by a subsequently elected official may change the duty actually spelled out in federal law. This is the core holding of *Rufo*, *Frew* and *Horne*. If the modification complies or will comply with federal law then, but only then, the state or local official is entitled to a modification. What would be lost would be duties and obligations written into the consent decree which are no longer needed to comply with federal law, or which represent policies not embraced by current officials in the management of their obligation to comply with federal law.

With respect to termination, the standard in the bill is equally clear: compliance with federal law. Since a significant majority of decrees involved statutes, Congress is, in effect, the final arbiter of when it is appropriate to terminate a decree. It should be a major concern of Congress that the practice of the courts is not consistent with Congressional authority.

For example, Congress invoked its spending power to compel states to provide non-English speaking children with instruction so that they may learn English. Congress did not specify the method of teaching or how much money the state had to spend in support of the language programs. Yet that is exactly what the plaintiffs in the *Horne* case asked the federal court to enforce via a consent decree; their preferred method of instruction and a specified allocation of public funds. Congress never agreed to nor placed such demands on the state of Arizona. Why should the controlling group, in the name of Congress, have the power to do precisely what Congress did not choose to do? The bill would insure that congressional choices written into law will not be altered through backdoor consent decree bargains brokered by the controlling group.

The bill thus protects the rights of plaintiffs and, within that constraint, restores policy making power to elected officials. Plaintiffs' attorneys will thereby have less power and earn less attorneys fees, but they have had a good thing that has gone on for too long.

Why Congress needs to act now

Congress has a special responsibility to address federal consent decrees against state and local officials because most of the decrees enforce statutes enacted by Congress. Most of those statutes left state and local government with discretion, but the consent decrees take it away. The lack of discretion prevents states and localities from adapting to the financial crises that so many of them now face.

Sunshine for Regulatory Decrees and Settlements Act

The justification for the Sunshine for Regulatory Decrees and Settlements Act is illustrated by the "Toxics Consent Decree" entered in *Natural Resources Defense Council et al. vs Train*, 6 ELR 20588 (D.D.C. June 9, 1976), a case under the Clean Water Act of 1972. In the Clean Water Act Congress had classified water pollutants into two major categories: ordinary and toxic. For ordinary pollutants Congress told EPA to adopt rules that were economically and technically feasible. But for toxic pollutants, Congress directed EPA to issue rules that fully protected public health. When EPA set about to issue the rules, it made much progress in issuing rules only for ordinary pollutants, but little progress on toxic pollutants. Perversely, the statutory command to fully protect public health from the worst water pollutants adopted by Congress with laudatory purposes frustrated even modest efforts to reduce exposure to those pollutants. In a nutshell, the statute was the problem.

NRDC with other environmental advocates sued. The plaintiffs and EPA came up with a solution: change the statute by agreement, and then legitimize that change by a consent decree. The consent decree reversed the Congressional enactment and allowed EPA to issue rules for toxic pollutants based on feasibility rather than health. At both the politically-appointee level and the career level, the agency welcomed the suit rather than fight it. Various businesses objected without success. The result: EPA in a private law suit successfully amended the statute without a bill passed by Congress and signed by the president.

Changing the standard for regulating toxic pollutants may have made sense, but the manner in which that change was made did not. The lesson that we draw from the Toxics Consent Decree is that consent decrees entered in cases against a federal agency can change decisions that Congress has made – both in setting standards and granting policy making

discretion – and that those changes can have profound impacts not only on the parties to the lawsuit but other members of the public .

Consent decrees entered in cases against federal regulatory agencies are legion and they routinely change the legal status quo by modifying statutory standards or restricting the policy making authority that Congress has conferred on agencies. Under Democratic and Republican president alike, agencies frequently fail to meet the deadlines set by Congress. Professor Richard Lazarus reported twenty years ago that EPA had met only 14 percent of the hundreds of deadlines set for it by Congress. Richard J. Lazarus, "The Tragedy of Distrust in the Implementation of Federal Environmental Law," 54 *Law and Contemporary Problems* 311, 323 (1991). The problem remains, and is often one of time and resources. Congress requires agencies to do more than they can with the time allowed and dollars appropriated. The failure to achieve mandatory deadlines makes the agencies defendants in open-and-shut lawsuits.

A consent decree in such a case can accelerate the promulgation of one type of regulation, but may also delay the promulgation of other regulations. The late federal judge Gerhard Gesell noted that an order requiring an agency to devote limited resources to one regulation means less of the agency's limited resources are available to deal with other regulations: "The Court cannot and should not ignore the fact that not only does EPA have other responsibilities in the regulatory area, but that is presently under exacting demands in other proceedings to accomplish its regulatory functions." *Illinois v. Costle*, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20243 (D.D.C. 1979).

How is a court to know that the consent decree is in the public interest – that it allocates scarce resources to the problem that most requires attention? One response is that the decree has the blessing of the agency at the time it is entered. But the rigidity of court decrees makes it hard for the agency to change policy later in the light of new information, new priorities, and new elections. In addition the agency has no say as to which lawsuits are brought. As a result, its consent to the entry of a decree is reactive rather than a positive affirmation as to what is the agency's highest priority. Another response is that the decree has the blessing of the advocacy organization that brought the lawsuit. But that response is even less satisfying. Advocacy organizations have private interests in attorney fees and in achieving power over policy, and suffer from the all too human penchant to think that their issue is the most important.

This bill provides Congress with an opportunity to establish procedures through which members of the public are given notice of, and an opportunity to participate in decisions embedded in consent decrees. This change is overdue. Were the same decisions made in a rulemaking governed by administrative procedures, members of the public would have the right to notice and comment, and a right to appeal to the courts. The public also deserves protection when an agency changes its mandate from Congress through a consent decree.

Thank you again for the opportunity to testify today. I look forward to answering any questions you may have.

Mr. COBLE. Thank you, Mr. Schoenbrod.

I failed to mention earlier the two bills on this matter have been introduced by two of our colleagues. H.R. 3041 by the gentleman from Arizona, Mr. Quayle, and Mr. Cooper from Tennessee has introduced 3041.

Pardon? I stand corrected. Mr. Quayle is 3862. Mr. Cooper is 3041.

Mr. Grossman, you are recognized for 5 minutes.

TESTIMONY OF ANDREW M. GROSSMAN, VISITING LEGAL FELLOW, THE HERITAGE FOUNDATION

Mr. GROSSMAN. Mr. Chairman and Members of the Subcommittee, thank you for holding this hearing today and for inviting me to testify.

My statement today, like my written testimony, will focus on consent decrees that restrict the future discretion of the Federal Government. In particular, I will discuss how these types of decrees threaten the constitutional separation of powers and democratic self-rule and what Congress can do about it.

I will begin with the constitutional issues. It is important here to define terms. What we are concerned about are provisions of consent decrees and in some cases settlement agreements that purport to constrain the future discretion of executive branch officials or the legislative branch.

Entry of a consent decree gives the court the power to enforce its terms on par with any normal judgment. The Federal Government, and the executive branch in particular, is not an ordinary litigant who may be subject to the judiciary's powers in every single instance. It is a coequal branch of the Government with its own powers that it may not trade or share with the other branches.

Particularly, those powers directly assigned by the Constitution to the President are inalienable. He may not, for example, agree to be bound in his exercise of the veto power or in his power to recommend legislation to Congress. Most broadly, he may not and should not bargain away the executive power, such as by cabining future exercises of discretion. Nor may he trade away powers that belong to Congress, such as the power of the purse.

These prohibitions are not just legal niceties. Breaching the separation of powers has real consequences. In general, public policy should be made in public through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics.

When, for reasons of convenience or advantage, public officials attempt to make policy in private, it is the public interest that suffers in a number of ways. First is the setting of priorities. Consent decrees can undermine presidential control of the executive branch, empowering activists and subordinated officials to set Federal priorities.

Regulatory actions are subject to the usual give-and-take of the political process, with the Congress, outside groups, and the public all influencing an Administration's or an agency's agenda through formal and informal meetings. Not so in court.

Second is transparency. Consent decrees are often faulted as secret regulation because they occur without public notice and participation. To be clear, consent decrees can effectively constitute regulation by requiring agencies to make specific policy choices in subsequent rulemakings, thereby taking certain issues off the table.

This runs counter to the wisdom embodied in the Constitution and in administration law. The public scrutiny and participation in law making leads to better substantive results.

Third is the elimination of flexibility. As the Reagan administration learned the hard way, consent decrees limit the Government's ability to alter its plans and to select the best response to address any given problem. In this way, they may freeze the regulatory processes of representative democracy.

Fourth is that consent decrees undermine accountability by shifting responsibility from public officials to judges and private litigants. It is very convenient that tough issues can be foisted on the courts, but it is also damaging to our politic.

None of these problems are intractable. There are solutions, and here is the easiest, most straightforward one. In an ideal world, the executive branch would take full responsibility for the exercise of its powers and would refuse to cede its authority to the courts and to private party litigants despite the promise of some short-term gain from doing so.

But now let us consider the world that we are in. Congress can and should adopt certain common sense policies that provide for transparency and accountability in decrees that compel future Government action.

First is transparency. All proposed decrees should be subject to notice and comment. DOJ should also be required to report to Congress in the Government's use of consent decrees.

Second is more robust public participation. An agency should be required to respond to comments, and parties that would have standing to challenge an action taken pursuant to a consent decree should have the right to intervene in a lawsuit where one may be lodged.

Third, where a consent decree compels an agency to take regulatory action, it should have to demonstrate that its proposed schedule affords sufficient time to comply with all requirements and furthers the public interest.

Fourth, let us give the public interest a seat at the table by requiring supporters of a consent decree to demonstrate by clear and convincing evidence with respect to the agency's regulatory agency and mandatory duties that a proposed decree is actually in the public interest. This would reduce the risk of collusion between regulators and special interests.

Fifth is to restore accountability. Before the Government enters into a consent decree, the Attorney General or agency head for agencies with independent litigating authority should be required to approve it personally.

Sixth, and finally, is flexibility. If the Government moves to terminate or modify a consent decree on the grounds that it is no longer in the public interest, the court should review that motion de novo under the same standard that I previously described.

I should note that these recommendations are largely reflected in the Sunshine for Regulatory Decrees and Settlements Act. This bill is the most significant step forward in this area since Attorney General Meese's 1986 memorandum on the topic.

Again, I thank the Committee for the opportunity to offer these remarks, and I look forward to your questions.

[The prepared statement of Mr. Grossman follows:]

Congressional Testimony

The Use and Abuse of Consent Decrees in Federal Rulemaking

Testimony before the
Subcommittee on the Courts, Commercial and Administrative Law,
Committee on the Judiciary,
United States House of Representatives

February 3, 2012

Andrew M. Grossman
Visiting Legal Fellow
The Heritage Foundation

> *As a policy device, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests.*
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> — *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1137 (Wilkey, J., dissenting)

My name is Andrew Grossman. I am a Visiting Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

The Subcommittee is to be commended for focusing its attention on the subject of this hearing, abuses of consent decrees in institutional reform and agency litigation, and for giving serious consideration to practical solutions to this problem. "Government by decree" is contrary to the principles of democratic self-governance. It takes power from the people's elected representatives and places it in the least accountable of the branches of government, the judiciary. Our federal courts are excellent at deciding the "cases and controversies" to which their jurisdiction is limited under the Constitution. But the judiciary lacks the institutional competence, resources, and mandate to oversee institutions and make government policy. As with any deviation from the constitutional separation of power, when the courts stray from their proper role, the consequences are myriad, from lack of transparency, to reduced governmental accountability, to bad public policy results.

These observations apply equally to consent decrees that bind federal agencies and limit their exercise of discretion as to consent decrees in institutional reform litigation regarding state programs. Especially in recent years, such consent decrees have been used to short-circuit normal agency rulemaking procedures, to accelerate rulemaking in ways that constrain the public's ability to participate in a meaningful fashion, and to do an end-run around the inherently political process of setting governmental priorities. In some cases, these decrees appear to be the result of collusion, where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals in ways that would be difficult or impossible outside of court. In these and other cases, consent decrees allow political actors to disclaim responsibility for agency actions that are unpopular and thereby evade accountability. And as with consent decrees in institutional reform litigation, previous administrations have, in several instances, abused such consent decrees in an attempt to bind their successors and limit their policy discretion. For these reasons, and more, consent decrees are often contrary to the public interest. More than that, consent decrees that limit discretion, if they are at all binding on the Executive Branch, also raise serious constitutional concerns.

There are solutions. The best, in my opinion, is for the Executive Branch itself to preserve its powers and discretion by declining to enter into consent decrees that compromise either. But this takes fortitude and the willingness to pass up short-term gain

for longer-term benefits that are less tangible, such as greater public participation in rulemaking and robust democratic accountability. It should come as little surprise that the Reagan Administration was willing to make this trade-off, and that its policy was spearheaded by Attorney General Edwin Meese III, who is now Chairman of the Center for Legal and Judicial Studies at the Heritage Foundation. As I will explain, the principles that Attorney General Meese laid out in a 1986 memorandum setting Department of Justice Policy on consent decrees and settlements remain vital today and should form the backbone of any attempt to address this problem. Although the ultimate decision on whether to enter into any given consent decree should be left to high-ranking and accountable Executive Branch officials, such as the Attorney General and agency heads, Congress can and should act to provide for greater transparency and public participation and to ensure that consent decrees are entered into and carried out in the public interest, rather than as a means to circumvent usual rulemaking procedures or to evade accountability.

Background

In the abstract, consent decrees serve a useful, beneficial purpose by allowing parties to settle claims without the expense and burden of litigation, while providing for ongoing judicial oversight of their settlement agreement. But litigation seeking to compel the government to undertake certain future acts is not the usual case, and the federal government is not the usual litigant. Consent decrees (and settlements) that bind the federal government present special challenges that do not arise in private litigation. This happens in all manner of litigation, and is not confined to a particular subject matter. Consent decrees binding federal actors have been considered in cases concerning environment policy, civil rights, federal mortgage subsidies, national security, and many others. Basically, consent decrees may become an issue in any area of the law where federal policymaking is routinely driven by litigation.

These special challenges arise when parties attempt to use consent decrees to do more than to mimic the results of litigation by simply stipulating the rights and obligations of the parties under law, as a court might rule if the case were to proceed to trial. Although a decree is regarded as a judgment for most purposes, its basis is not the application of the law by a disinterested arbiter, but the consent of the parties. Accordingly, parties may agree to terms that would be unavailable to a court issuing its own judgment on a case, and yet have those terms "blessed" by the court through its adoption of the decree. In this way, parties can use the court to adopt terms that may affect the rights of third parties or have consequences beyond the dispute between the parties. While third parties may be able to directly challenge, or at least contract around, consent decrees that affect their rights in litigation among private parties, the public may have little or no recourse when its rights are traded away.

But why would a public official do such a thing? Judge Frank Easterbrook provides a compelling account of the ways that government officials may use consent decrees to obtain advantage—over Congress, over successors, over other Executive Branch officials—in achieving their policy goals:

> The separation of powers inside a government—and each official's concern that he may be replaced by someone with a different agenda—creates incentives to use the judicial process to obtain an advantage. The consent decree is an important element in the strategy. Officials of an environmental agency who believe that the regulations they inherited from their predecessors are too stringent may quickly settle a case brought by industry (as officials who think the regulations are not stringent enough may settle a case brought by a conservation group). A settlement under which the agency promulgated new regulations would last only for the duration of the incumbent official; a successor with a different view could promulgate a new regulation. Both parties to the litigation therefore may want a judicial decree that ties the hands of the successor. It is impossible for an agency to promulgate a regulation containing a clause such as "My successor cannot amend this regulation." But if the clause appears in a consent decree, perhaps the administrator gets his wish to dictate the policies of his successor. Similarly, officials of the executive branch may obtain leverage over the legislature. If prison officials believe their budget is too small, they may consent to a judgment that requires larger prisons, and then take the judgment to the legislature to obtain the funds.[1]

I am not as sanguine as Judge Easterbrook that bad regulations by one administration may be easily replaced or repealed by the next. But if anything, this makes his point far stronger: a government official who uses a consent decree to rush a rulemaking process may gain an advantage over possible successors who do not share his agenda, as well as competitors within his own administration. Even routine consent decrees—ones that do not, on their face, appear to bind successors, but merely require an official to take some act that durably alters legal entitlements—should therefore be subject to significant scrutiny.

Judge Easterbrook also observes—correctly, in my view—that the existing law does not thoughtfully address the possibility of consent decrees based on collusion or primarily intended for their external effects, rather than merely to resolve the dispute before the court. Federal Rule of Civil Procedure 60(b) allows for the modification of judgments, but underlying it is the assumption that a judgment accurately reflects parties' entitlements under law—something that may not be true in the case of a consent decree where the parties interests are not opposed, but aligned. Based on this assumption, courts typically require a strong showing of changed circumstances to justify revision of a consent decree. They also typically disfavor challenges by third parties. The result is that the public's rights and interests may go unrepresented in legal proceedings that incorrectly assume an adversarial posture and only minor externalities.

All of this implicates rights, under the Constitution and otherwise. Jeremy Rabkin and Neal Devins argue persuasively that some consent decrees may intrude on the rights

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[1] Frank Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. Chi. L. Forum 19, 33-34 (1987).

and prerogatives of the Executive Branch and thereby violate the separation of powers.[2] Entry of a decree gives the court the power to enforce its terms, on par with any normal judgment, but the federal government—and the Executive Branch, in particular—is not an ordinary litigant who may be subject to the judiciary's powers in every instance. Rather, it is a co-equal branch of government, with its own powers that it may not trade or share with the other branches. The Supreme Court has made clear, repeatedly, that it lacks that authority.[3] It is clear from this case law, for example, that those powers assigned by the Constitution to the President are inalienable. He may not, for example, agree to be bound in his exercise of the veto power or, most likely, in his power to recommend legislation to Congress.[4]

Spending authority presents a closer question. The President's power here is subordinate to Congress's, which implies that he may not commit funds that Congress has not appropriated. But he may, in some circumstances, make contingent commitments, which raise their own difficulties:

> Where the executive promises to provide funds only if and when relevant appropriations are approved by Congress, such promises may seem to pose no threat to the legislative power of the purse. And, the courts could therefore enforce such a promise without constitutional objection if Congress subsequently enacts the relevant appropriation. Yet suppose that Congress intended the appropriation to cover a large number of projects or programs but full satisfaction of a prior contingent commitment has the effect of excluding most other expenditures because the prior commitment preempts so much of the appropriation. In that case, enforcement of a contingent finding commitment might indeed thwart legislative expectations and thus still threaten legislative control of the federal pursestrings.[5]

Rabkin and Devins suggest that the sovereign breach doctrine provides a safeguard here, such that an agency may generally be held to its contingent funding commitment, but such a commitment "could not prevent the agency from altering its general funding policies, even though the policy alteration had the incidental effect of limiting the funds

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[2] Jeremy Rabkin and Neal Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987) [hereinafter *Constitutional Limits*].

[3] *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986) (executive may not give away power to execute the laws); Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (executive may not give away veto power).

[4] Memorandum from Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, to Raymond Fisher, Associate Attorney General, regarding Authority of the United States To Enter Settlements Limiting the Future Exercise of Executive Branch Discretion (June 15, 1999), *available at* http://www.justice.gov/olc/consent_decrees2.htm [hereinafter "OLC Memorandum"].

[5] *Constitutional Limits* at 235-36.

available for that particular commitment." Put differently, "[n]o agency has the constitutional authority to restrict its own ability to alter 'general and public' policies."[6]

In a 1999 memorandum, the Office of Legal Counsel adopted the opposite view, arguing that the Constitution in no way limits the Executive's power to incur obligations in advance of appropriations. It reasons that the Antideficiency Act, 31 U.S.C. § 1341, which countenances certain "authorized" exemptions, demonstrates that the President may in fact incur such obligations without constitutional limit. This memorandum, however, performs a slight of hand, conflating the President's authority to incur prospective obligations where authorized by Congress with his power (under the Constitution) to incur them on his own say-so. In this, it effectively ignores the Appropriations Clause, weakly suggesting that the Executive Branch avoid incurring such obligations where possible.[7] Rabkin and Devins have the better argument on this point.

A third area is the carrying out of the laws through regulation. As with traditional law enforcement, the Executive's discretion is, within the boundaries set by Congress in defining the law, nearly "absolute."[8] Relying on administrative review cases, Rabkin and Devins conclude that the Executive possesses an irreducible quantum of discretionary power in the regulatory process that cannot be arrogated in consent decrees:

> The Court has been inconsistent in its rulings on the degree to which courts should defer to an agency's interpretation of its statutory mandate, although it has generally urged some degree of deference. Even where the courts have substituted their own judgments regarding the construction of statutory standards, however, they have rarely directed executive agencies to particular rulemaking results. Rather, the courts have almost always remanded challenged rules back to the agency for revision 'in the light of' the court's construction of the relevant statutory mandate. This practice acknowledges that a good deal of discretion must inevitably remain with implementing agencies, even in rulemaking.[9]

The Supreme Court recognized as much in *Massachusetts v. EPA*, when it declined to require EPA to regulate greenhouse gas emissions by new motor vehicles and instead directed the agency to provide "reasons for action or inaction [that] conform to the authorizing statute."[10]

And, of course, the Executive's discretion is limited by the guarantees of rights contained in the Constitution and its amendments. No one would seriously argue that it has the authority to enter into a consent decree that abrogates a third party's speech rights or requires it to seize, without due process or compensation, a third party's property.

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[6] *Id.* at 236.
[7] OLC Memorandum.
[8] United States v. Nixon, 418 U.S. 683, 693 (1971).
[9] *Constitutional Limits* at 241 (footnotes omitted).
[10] Massachusetts v. EPA, 127 S.Ct. 1438, 1462 (2007).

Finally, the bulk of rights are not constitutional in nature, but flow from statutory guarantees. Even the Office of Legal Counsel ("OLC"), which takes a narrow view of limits on Presidential power (even limits that prevent the President from trading away his powers), recognizes that "the Attorney General ordinarily may not settle litigation on terms that would transgress valid, otherwise applicable, statutory restrictions on agency conduct."[11] Thus, an agency may not agree to ignore, in a rulemaking, a particular factor that it is bound by the statute to consider, or to consider another factor that the statute requires it to ignore. It must also abide by all procedural requirements, including, where applicable, those of the Administrative Procedure Act. Thus, an agency may not agree to dispense with notice and comment in most circumstances. And even OLC, which does not believe that the Constitution bars the President from trading away his discretion, argues that the APA may, in effect, do so, by requiring that agencies adhere to certain procedures in reaching substantive outcomes.[12]

In sum, consent decrees (and in some instances, settlement agreements) that bind the federal government to undertake particular future actions present special risks and concerns that are simply not present in litigation between private parties. Nonetheless, they receive no greater scrutiny than consent decrees in cases that concern private parties' rights, that do not present issues of great public interest, and that do not predominantly effect third parties' rights.

Consent Decrees at Issue

Having sketched the problem, it is useful to fill in greater detail by surveying experience. In an attempt to distance this issue from the political and policy controversies of today, this discussion will, with one exception, discuss cases that arose in the 1970s and 1980s but which remain typical, in their essential points, of cases today.

***National Audubon Society v. Watt* (1982).**[13] The court describes the history of this case crisply:

> This appeal arises out of protracted litigation concerning the federal government's plans to construct a 250,000-acre water development project, the Garrison Diversion Unit, in North Dakota. In 1977, in connection with a suit by the National Audubon Society seeking injunctive relief for alleged violations of federal statutes including the National Environmental Policy Act (NEPA), the Secretary of the Interior and Audubon agreed to the Stipulation and Order at issue in this case. The stipulation provided that the parties would suspend litigation on the merits, and that the government would not proceed with major construction on the Garrison project until the Secretary had completed two environmental studies and submitted proposed legislation to Congress, and until Congress had adopted legislation either reauthorizing, modifying, or deauthorizing the

[11] OLC Memorandum.
[12] *Id.*
[13] 678 F.3d 299 (D.C. Cir. 1982).

> project. Five years later, under a new Administration, the government contends that the stipulation is no longer binding.

The Reagan Administration argued that the consent decree was invalid because "one Administration may not constitutionally bind its successors in the exercise of policymaking discretion, and that the judiciary may not command the Executive Branch to exercise its discretionary powers in any particular manner."[14] But the court ducked the "novel and far-reaching constitutional issues involved," instead finding within the consent decree an "implied condition subsequent," consistent with the government's limited authority under NEPA to delay implementation of an authorized project, that, "[i]f Congress fails to act after having had a reasonable opportunity to reconsider the 1965 authorizing legislation, the parties shall no longer be bound by the stipulation."[15] Accordingly, the court vacated the injunction entered by the district court.

***Environmental Defense Fund v. Costle* (1980) / *Citizens for a Better Environment v. Gorsuch* (1983).**[16] The D.C. Circuit's punt in *National Audubon Society* was consistent with the Court's treatment of *EDF v. Costle* two years prior, when it pointedly declined to address the issue of restrictions on a federal official's discretion to enter into a consent decree and remanded the case for further proceedings on that issue.

Three years after that, the case returned, under a new title, and the constitutional issue could not be easily avoided. The court summarized the case's posture:

> [T]he Agreement [consent decree] was entered into by the original parties to these consolidated cases in settlement of the plaintiffs' claims that EPA had failed to carry out its statutory duty to implement certain provisions of the Federal Water Pollution Control Act . . . . The Agreement contains a detailed program for developing regulations to deal with the discharge of toxic pollutants under the CWA. It required EPA to promulgate guidelines and limitations governing the discharge by 21 industries of 65 specified pollutants. It also mandated the use of certain scientific methodologies and decision-making criteria by EPA in determining whether additional regulations should be issued and whether other pollutants should be included in the regulatory scheme. It did not specify the substantive result of any regulations EPA was to propose and only required EPA to initiate "regulatory action" for other pollutants identified through the research program. The regulations envisaged by the Agreement were, after full notice and comment, to be promulgated in phases by December 31, 1979 and the industries affected were to comply with them by June 30, 1983.[17]

Industry interveners challenged the decree on the grounds that it impermissibly infringed upon the EPA Administrator's discretion by precluding him from taking actions otherwise open to him under the CWA. In the absence of the decree, they argued, EPA

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[14] *Id.* at 305.
[15] *Id.* at 310.
[16] 636 F.2d 1229 (1980); 718 F.2d 1117 (1983).
[17] 718 F.2d at 1120-21.

could in the exercise of this discretion choose whether or not to establish the criteria and programs which the decree mandates. The court rejected this argument, on the basis that the "Decree here was largely the work of EPA and the other parties to these suits, not the district court," and therefore "the requirements imposed by the Decree do not represent judicial intrusion into the Agency's affairs to the same extent they would if the Decree were a creature of judicial cloth."[18]

Judge Wilkey authored a stirring dissent, taking on the majority's view of both the facts and the law. As to the facts, the district court was heavily engaged in the making of the consent decree: "The court shaped it, scrutinizing and even altering its terms."[19] As to the law, EPA's consent, he argued, was irrelevant:

> [A] decree of this type binds not only those present Administrators who may welcome it, but also their successors who may vehemently oppose it. For reasons that ultimately have to do with preserving the democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion. Today's majority decision effectively undercuts that line of authority by allowing an Administrator to waive his successor's power of discretion—so long as a court is willing to play accomplice.[20]

"The greatest evil of government by consent decree," Judge Wilkey concluded, "comes from its potential to freeze the regulatory processes of representative democracy."[21] He warned, too presciently, of the "foreseeable mischief" that would follow.

***Ferrell v. Pierce* (1984).**[22] A sure sign that judicial overreach follows is an opinion that opens with a statement of this sort: "Congress has declared as a policy 'the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family.'"[23] *Ferrell* delivers.

Rabkin and Devins summarize the case's posture:

> [*Ferrell*] involved a mortgage insurance program operated by the Department of Housing and Urban Development. In 1976, HUD settled a suit brought by low-income homeowners in the Chicago area and promised to take assignment of the mortgages of these homeowners, under certain conditions, to prevent foreclosures by the original mortgagees. When the plaintiffs subsequently charged HUD with failure to observe the terms of this agreement in 1979, the parties agreed to an amended stipulation. HUD promised that 'it would operate the assignment program for five years in accordance with its newly-revised handbook'; that 'it

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[18] *Id.* at 1128 (internal quotation marks and citation omitted).
[19] *Id.* at 1130 (Wilkey, J., dissenting).
[20] *Id.* at 1134 (footnote omitted).
[21] *Id.* at 1136.
[22] 743 F.2d 454 (7th Cir. 1984).
[23] *Id.* at 455.

> would not, during this period curtail the 'basic rights' of participating mortgagors'; that it would 'give notice to plaintiffs' counsel prior to final action on any modification'; and, that after the expiration of the five year period, it would continue the assignment program or an 'equivalent substitute.' In 1980, on HUD's recommendation, Congress enacted the Temporary Mortgage Assistance Program ("TMAP") as a means of coping with skyrocketing costs under the mortgage assignment program. Under TMAP, HUD would not take over mortgages when insured, low-income homeowners were threatened with foreclosure, but would simply assist them in meeting their monthly payments to the original mortgagees. When HUD sought further to amend the 1979 amended stipulation in *Ferrell* to specify that TMAP assistance would satisfy its requirements, the district court judge refused to allow the change. HUD's implementing regulations for TMAP, the district judge found, had tightened eligibility requirements and lowered the quality of mortgage assistance in various ways so that it was not really an 'equivalent substitute.'[24]

The Reagan Administration appealed, urging the Seventh Circuit "to read the Amended Stipulation as not governing TMAP in order to avoid 'difficult constitutional issues'" regarding the scope of an executive official's discretion "to bind his or her successors in office to substantive policy interpretations of a not-as-yet enacted statute."[25] The court dismissed the argument for its "novelty" and found it waived regardless.[26]

As Judge Coffey explained in dissent, the result of this decision was to require substantial federal expenditures where Congress had designed and enacted an alternative, "an unprecedented infringement upon the legislative process."[27]

***United States v. Board of Education of Chicago* (1984).**[28] In September 1980, the Carter Administration's Department of Justice entered into a consent decree to resolve claims regarding its funding to support desegregation of the Chicago school district by requiring it "to make every good faith effort to find and provide every available form of financial resources (sic) adequate for the implementation of the desegregation plan." The district court ruled in 1983 that the Reagan Administration had failed to satisfy this obligation and ordered it "to provide presently available funds, to find every available source of funds, to support specific legislative initiatives to meet the obligations of the Board, and 'not [to] fail[] to seek appropriations that could be used for desegregation assistance to the Board.'"[29]

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[24] *Constitutional Limits* at 252-53.
[25] 743 F.2d at 462-63.
[26] *Id.* at 463 ("Even if the constitutional issue were properly before us, we doubt that it would be so substantial as to require us to ignore the plain language of the consent decree.").
[27] *Id.* at 471.
[28] 744 F.2d 1300 (Seventh Circuit).
[29] *Id.* at 1301.

The Seventh Circuit vacated the district court's order, taking care to interpret the consent decree narrowly on the ground that "a government's attempts to remedy its noncompliance with a consent decree are to be preferred over judicially-imposed remedies."[30] But as to the government's argument that its legislative activities are unreviewable by the judiciary, the Court allowed that the district court, rather than impose a penalty for the government's lobbying activities, should instead have entered a civil contempt citation that "ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under the Decree" and that, if the government persisted, "criminal contempt charges might have been appropriate."[31] It also chastised the government for actions, "while perhaps within constitutional limits, cannot enhance the respect to which this Decree is entitled and do not befit a signatory of the stature of the United States Department of Justice."[32]

***American Nurses Association v. Jackson* (2011).** Finally, let's conclude with a more recent example. A coalition of environmental organizations sued EPA in December 2008, shortly after the presidential election that year, faulting the agency's failure to issue emissions standards for certain "hazardous air pollutants" issued by power plants under § 112 of the Clean Air Act, 42 U.S.C. § 7412. In its final months in office, the Clinton EPA had issued a predicate finding that such regulations were "appropriate and necessary," but the George W. Bush Administration subsequently attempted to reverse that finding. Soon after the lawsuit was filed, a coalition of industry members was granted leave to intervene.

There was little movement of the case until October 2009, when the plaintiffs and EPA concluded their private negotiations and lodged a proposed consent decree with the court. The decree stipulated that EPA had failed to perform a mandatory duty under the Clean Air Act by failing to issue a "maximum achievable control technology" ("MACT") rule for power plants under Clean Air Act § 112(d). It further specified that EPA would sign a proposed rule by March 16, 2011, and would then sign a final rule no later than November 16, 2011—just eight months later. EPA leaders, far from adverse to the plaintiffs who had initiated the suit, publicly touted the rulemaking as a signal achievement of the Obama EPA.

The interveners challenged the proposed consent decree, which the plaintiffs and EPA had negotiated without any industry participation. The agreement unduly constrained executive discretion, the interveners argued, because it required EPA to conclude that § 112(d) standards would be required and thereby blocked the agency from either declining to issue standards[33] or implementing standards based, in whole or in part, on health-based thresholds rather than the more onerous MACT standard. Further, the proposed decree, they argued, all but guaranteed violations of the Administrative

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[30] *Id.* at 1306.
[31] *Id.* at 1308.
[32] *Id.*
[33] *See* New Jersey v. EPA, 517 F.3d 574, 582 (EPA may delist power plants under Clean Air Act § 112(d)(9)).

Procedure Act due to the vast complexity of the task before EPA, which could not possibly be completed in such a short period under the Administrative Procedure Act's "arbitrary and capricious" standard.[34] As the interveners explained, the schedule contemplated by the proposal was far shorter than EPA had employed in less-complicated rulemakings that did not require the agency, as in this instance, to evaluate its proposed rule's impact on the nation's electric generating fleet. The public interest, it concluded, required at least twelve months for the industry and interested parties to undertake this task.

The court ruled on none of these points in its order and opinion approving the consent decree. As to the language constraining EPA's discretion in the final rule, the court missed the gravamen of the argument entirely, stating that EPA believed itself to be legally obligated to issue § 112(d) standards and, "and by entering this consent decree the Court is only accepting the parties' agreement to settle, not adjudicating whether EPA's legal position is correct." The interveners, the court explained, could simply challenge the final rule. As for the schedule, while appreciating the interveners' position, the court refused to accord it any weight, presumably due to their status as third-party objectors: "If the science and analysis require more time, EPA can obtain it." Finally, the court cited somewhat inapposite language from *Local Number 93, International Association of Firefighters, AFL-CIO, C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986), which concerned the rights and obligations of private parties, in support of the proposition that third parties may not block a consent decree.[35]

Unfortunately, it appears that the interveners' claims were, as the court acknowledged, "not insubstantial." EPA's proposed rule, rushed out in a matter of months, contained numerous errors—one emission standard, for example, was off by a factor of 1,000—was lacking technical support documents necessary for interested parties to assess it, and was, in some places, sufficiently vague that regulated entities were unable to determine their compliance obligations. EPA had also, in its haste, declined to assess the implications of its rule on electric reliability or to provide sufficient time for industry and regulators to do so, despite a statutory requirement that EPA take account of "energy requirements" and the possibility that the rule could conflict with requirements under the Federal Power Act. Several preliminary assessments—by the Federal Energy Regulatory Commission and North American Electric Reliability Corporation—suggested that the rule would force enough shutdowns to threaten reliability in some areas.[36] Those assessments, as well as industry evaluations, also raised the prospect that significant numbers of sources would be unable to come into compliance with the

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[34] *See* Motor Vehicle Manufacturers' Association v. State Farm Insurance, 463 U.S. 29, 43 (1983) (action is arbitrary and capricious where agency "entirely failed to consider an important aspect of the problem" before it).

[35] Memorandum Opinion, American Nurses Assoc. v. Jackson, No. 1:08-cv-02198-RMC (Apr. 15, 2010).

[36] FERC, Office of Electric Reliability, Potential Retirement of Coal Fired Generation and its Effect on System Reliability, Oct. 27, 2010; NERC, *2011 Long-Term Reliability Assessment* 73, 76 (2011).

proposed standards within the three-year compliance window, even with the possibility of an additional year to achieve compliance.[37]

Late in 2011, industry interveners brought these concerns to the district court, seeking relief from the consent decree on the basis of changed circumstances—specifically, the unforeseen circumstance that, faced with overwhelming evidence that more time was necessary to craft a rule that complied with all procedural and substantive requirements, EPA would not avail itself of the consent decree's provision to seek the time needed to carry out its legal obligations. Although EPA signed a final rule in late December, the court has yet to rule on the interveners' motion.[38]

The Meese Memorandum

It was the Carter Administration's abuse of consent decrees, and the courts' willingness to hold the government to agreements that bound the Reagan Administration to its predecessor's unwise policy choices, that led Attorney General Edwin Meese III to rethink the federal government's approach to settlement. While a partisan might have seized the opportunity to enter into more consent decrees, on every possible topic, so as to entrench the present administration's views for years or decades to come in vital policy areas, Attorney General Meese looked to the broader principles of the Constitution in formulating a policy that would take the opposite tack, by limiting the permissible subject matter of consent decrees "in a manner consistent with the proper roles of the Executive and the courts."[39]

In particular, the Meese Policy identified three types of provisions in consent decrees that had "unduly hindered" the Executive Branch and the Legislative Branch:

> 1. A department or agency that, by consent decree, has agreed to promulgate regulations, may have relinquished its power to amend those regulations or promulgate new ones without the participation of the court.
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> 2. An agreement entered as a consent decree may divest the department or agency of discretion committed to it by the Constitution or by statute. The exercise of discretion, rather than residing in the Secretary or agency administrator, ultimately becomes subject to court approval or disapproval.

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[37] *See, e.g.*, Comments of Southern Company, Docket No. EPA-HQ-OAR-2009-0234-18023, at 35-37 (Aug. 4, 2011) (presenting current timelines for installation of scrubbers and fabric filter systems).

[38] On behalf of several non-profit groups, I filed an *amicus curiae* brief in support of that motion. Amicus Brief by Americans for Prosperity, Cause of Action, Center for Rule of Law, Institute for Liberty, and the National Black Chamber of Commerce in Support of Motion for Relief from Judgment, American Nurses Assoc. v. Jackson, No. 1:08-cv-02198-RMC (Dec. 1, 2011). In addition, 21 states and Guam also filed a brief supporting the request for additional time for the rulemaking.

[39] Memorandum from Edwin Meese III Regarding Department Policy Regarding Consent Decrees and Settlement Agreements, Mar. 13, 1986, at 1 [hereinafter Meese Policy].

> 3. A department or agency that has made a commitment in a consent decree to use its best efforts to obtain funding from the legislature may have placed the court in a position to order such distinctly political acts in the course of enforcing the decree.[40]

These categories corresponded closely to the arguments that the Department of Justice had raised, with varying degrees of success, in *National Audubon Society v. Watt*, *Ferrell*, and *Chicago Board of Education*.

Accordingly, the Meese Policy propounded policy guidelines prohibiting the Department of Justice, whether on its own behalf or on behalf of client agencies and departments, from entering into consent decrees that limited discretionary authority in any of three manners:

> 1. The department or agency should not enter into a consent decree that converts into a mandatory duty the otherwise discretionary authority of the Secretary or agency administrator to revise, amend, or promulgate regulations.
>
> 2. The department or agency should not enter into a consent decree that either commits the department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek a particular appropriation or budget authorization.
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> 3. The department or agency should not enter into a consent decree that divests the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties.[41]

With respect to settlement agreements, the Meese Policy imposed similar limitations, buttressed by the requirement that the sole remedy for the government's failure to comply with the terms of an agreement requiring it to exercise its discretion in a particular manner would be revival of the suit against it.[42] In all instances, the Attorney General retained his authority to authorize consent decrees and agreements that exceeded these limitations but did not "tend to undermine their force and is consistent with the constitutional prerogatives of the executive or the legislative branches."[43]

The new policy was announced at a press conference by Charles Cooper, then head of Department's Office of Legislative Counsel. Cooper stated that the Government had, over the years, entered into "scores, perhaps hundreds, of consent decrees," and that

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[40] *Id.* at 1-2.
[41] *Id.* at 3.
[42] *Id.* at 4.
[43] *Id.*

the Reagan Administration had felt hamstrung as a result in a number of cases.[44] He described and cited *Ferrell*, *Citizens for a Better Environment v. Gorsuch*, and *Chicago Board of Education*.[45]

Going by news reports, the reaction among activist groups that sue to effect changes in government policy was negative. Ralph Neas, for example, told the *Washington Post*, "It appears that Justice once again is abandoning enforcement policies used by previous Democratic and Republican administrations." "The net result," he predicted, "would be a narrowing of remedies that would be available to victims of unlawful discrimination" and more "prolonged and costly legal proceedings."[46] A former Reagan Department of Justice official complaint that the Administration was, in effect, "tying its own hands."[47]

The controversy, however, died down quickly, as it became apparent that the change was, in practical terms, a small one that would effect relatively few cases. This was in line with Cooper's prediction of how the Department would operate under the new policy. For example, he hypothesized, it might agree to construct a new prison wing to relieve overcrowding, but would not allow that obligation to be the subject of a consent decree. In most cases—perhaps nearly all—the prison wing would be constructed, and that would be that.[48] But in the rare case where circumstances or policies change, the court could not attempt to compel the government to spend the money on the project. It could, for example, choose to relocate prisoners, to renovate existing facilities, or any of a number of options. In this way, the federal government would retain its flexibility and policy discretion. Only in the case of an adverse judgment, and commensurate remedial order, would the federal government be bound as to the specifics.

The Meese Policy was, and remains, notable for its identification of a serious breach of the separation of powers, with serious consequences, and its straightforward approach to resolving that problem. By reducing the issue, and its remedy, to their essentials, the Meese Policy identifies and protects the core principles at stake. This explains its continued relevance.

An End-Run Around Democratic Governance and Accountability

Beyond the broad principles identified by the Meese Policy, the abuse of consent decrees in regulation also raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government. In general, public policy should be made in public, through the normal mechanisms of legislating and administrative law and subject to the give-and-take of politics. When, for reasons of convenience or advantage, public officials attempt to make policy in private sessions

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[44] Robert Pear, *Meese Restricts Settlements in Suits Against Government*, N.Y. Times, Mar. 22, 1986, at A1.
[45] *Id.*
[46] Howard Kurtz, *Attorney General Reduces Scope of Consent Decrees*, Wash. Post, Mar. 22, 1986, at A2.
[47] Pear, *Meese Restricts*.
[48] *Id.*

between government officials and (as is often the case) activist groups' attorneys, it is the public interest that often suffers. Experience demonstrates at least three specific consequences that may arise when the federal government regulates pursuant to a consent decree:

- **Special-Interest-Driven Priorities.** Consent decrees can undermine presidential control of the executive branch, empowering activists and subordinate officials to set the federal government's policy priorities. Regulatory actions are subject to the usual give and take of the political process, with Congress, outside groups, and the public all influencing an administration's or an agency's agenda, through formal and informal means. This include, for example, congressional policy riders or pointed questions for officials at hearings; petitions for rulemaking filed by regulated entities or activists; meetings between stakeholders and government officials; and policy direction to agencies from the White House. Especially when they are employed collusively, consent decrees short-circuit these political processes. In this way, agency officials can work with outside groups to force their agenda in the face of opposition—or even just reluctance, in light of higher priorities—from the White House, Congress, and the public. When this happens, the public interest—as distinct from activists' or regulators' special interests—may not have a seat at the table as the agency reorganizes its agenda by committing to take particular regulatory actions at particular times, in advance or to the exclusion of other rulemaking activities that may be of greater or broader benefit.

- **Rushed Rulemaking.** The public interest may also be sacrificed when officials use consent decrees to accelerate the rulemaking process by insulating it from political pressures that may reasonably require an agency to achieve its goals at a more deliberate speed. In this way, officials may gain an advantage over other officials and agencies that may have competing interests, as well as over their successors, by rushing out rules that they otherwise may not have been able to complete or would have had to scale back in certain respects.

  In some instances, aggressive consent decree schedules, as in *American Nurses*, may provide the agency with a practical excuse (albeit not a legal excuse) to play fast and loose with Administrative Procedure Act and other procedural requirements, reducing the opportunity for public participation in rulemaking and, substantively, likely resulting in lower-quality regulation. Although a consent decree deadline does not excuse an agency's failure to observe procedural regularities, courts are typically deferential in reviewing regulatory actions and are reluctant to vacate rules tainted by procedural irregularity in all but the most egregious cases, where agency misconduct and party prejudice are manifest. In practical terms, members of the public and regulated entities whose procedural rights are compromised by overly-aggressive consent decree schedules can rarely achieve proper redress.

- **Practical Obscurity**. Consent decrees are often faulted as "secret regulation," because they occur outside of the usual process designed to guarantee public

notice and participation in policymaking.[49] As one recent article argues, "[W]hen the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree," but too often these settlements are not subject to any public scrutiny.[50] And even when the public is technically provided notice, that notice may be far less effective than would ordinary be required under the Administrative Procedure Act. The result is that the agency may make very serious policy determinations that affect the rights of third parties in serious ways without subjecting its decisionmaking process to the public scrutiny and participation that such an action would otherwise entail. This is so despite that a consent decree may be more binding on an agency than a mere regulation, which it may alter or abandon without a court's permission.

- **Eliminating flexibility**. As the Reagan Administration learned, abusive consent decrees may reduce the government's flexibility to alter its plans and to select the best policy response to address any given problem. The Supreme Court has recently clarified that agencies need not provide any greater justification for a change in policy than for adopting a new policy, recognizing the value of flexibility in administering the law.[51] It is unusual, then, that when an agency acts pursuant to a consent decree, it has substantially less discretion to select other means that may be equally effective in satisfying its statutory or constitutional obligations. In effect, consent decrees have the potential to "freeze the regulatory processes of representative democracy."[52]

- **Evading Accountability**. What the preceding points share in common is that they all serve to reduce the accountability of government officials to the public. The formal and informal control that Congress and the President wield over agencies is hindered when they act pursuant to consent decrees. Their influence is replaced by that of others:

> Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy. Standing guard over the whole process is the court, the one branch of our government which is by design least responsive to democratic pressures and least fit to accommodate the many and varied interests affected by the decree. The court can neither

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[49] *See, e.g.*, Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DePaul L. Rev. 515 (2010). Such concerns may be overblown, however, when they concern settlements between private parties or settlements with the government that predominantly affect private rights.

[50] *Id.* at 516.

[51] FCC v. Fox Television Stations, 129 S.Ct. 1806 (2009).

[52] *Citizens for a Better Environment*, 718 F.2d at 1136 (Wilkey, J., dissenting).

> effectively negotiate with all the parties affected by the decree, nor ably balance the political and technological trade-offs involved. Even the best-intentioned and most vigilant court will prove institutionally incompetent to oversee an agency's discretionary actions.[53]

Recommendations for Congress

In an ideal world, the Executive Branch would take full responsibility for the exercise of its powers and would refuse to cede its authority to the courts and to private-party litigants, despite the promise of some short-term gain from doing so. Barring settlements that restrain executive discretion by statute would itself raise constitutional and policy questions and would be, in any case, incongruous with the many provisions of law that afford private parties license to compel the government to take future actions.

But Congress can and should adopt certain common-sense policies that provide for transparency and accountability in consent decrees that compel future government action. Any legislation that is intended to address this problem in a comprehensive fashion should include the following features, with respect to consent decrees that commit the government to undertake future action of a generally-applicable quality:

- **Transparency**. Proposed consent decrees should be subject to the usual notice and comment requirements, as is generally the case under the Clean Air Act.[54] In addition, to aid Congress and the public in its understanding of this issue, the Department of Justice should be required to make annual reports to Congress on the government's use of consent decrees.

- **Robust Public Participation**. As in any rulemaking, an agency or department should be required to respond to the issues raised in public comments on a proposed consent decree, justifying its policy choices in terms of the public interest; failure to do so would prevent the court from approving the consent decree. These comments, in turn, would become part of the record before the court when it rules on the consent decree. Parties who would have standing to challenge an action taken pursuant to a consent decree should have the right to intervene in a lawsuit where a consent decree may be lodged. As described below, these interveners should have the opportunity to demonstrate to the court that a proposed decree is not in the public interest.

- **Sufficient Time for Rulemaking**. The agency should bear the burden of demonstrating that any deadlines in the proposed decree will allow it to satisfy all applicable procedural and substantive obligations and further the public interest.

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[53] *Id.* at 1136-37.

[54] Clean Air Act § 113(g), 42 U.S.C. § 7413(g). Note that this provision, however, does not require EPA to respond to comments, only that, "as appropriate," it "shall promptly consider" them.

- **A Public Interest Standard**. Especially for consent decrees that concern future rulemaking, those parties in support of the decree should bear the burden of demonstrating that it is in the public interest. In particular, they would have to address (1) how the proposed decree would affect the discharge of all other uncompleted nondiscretionary duties; and (2) why taking the regulatory actions required under the consent decree, to the delay or exclusion of other actions, is in the public interest. The court, in turn, before ruling on the supporters' motion to accept the consent decree, would have to "satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest"[55] which supporters of the consent decree would be required to demonstrate by clear and convincing evidence..

- **Accountability**. Before the government enters into a consent decree that contains any of the types of provisions identified in the Meese Policy, the Attorney General or agency head (for agencies with independent litigating authority) should be required to certify that he has reviewed the decree's terms, found them to be consistent with the prerogatives of the Legislative and Executive Branches, and approves them. In effect, Congress should implement the Meese Policy, consistent with the Executive Branch's discretion, by requiring accountability when the federal government enters into consent decrees or settlements that cabin executive discretion or require it to undertake future actions.

- **Flexibility**. Finally, Congress should act to ensure that consent decrees do not freeze into place a particular official's or administration's policy preferences, but afford the government reasonable flexibility, consistent with its constitutional prerogatives, to address changing circumstances. To that end, if the government moves to terminate or modify a consent decree on the grounds that it is no longer in the public interest, the court should review that motion *de novo*, under the public interest standard articulated above.

Conclusion

No less than in institutional-reform litigation, consent decrees that govern the federal government's future actions raise serious constitutional and policy questions and are too often abused to circumvent normal political process and evade democratic accountability. Congress can and should address this problem in a comprehensive, yet targeted, fashion to ensure that such consent decrees are employed only in circumstances where they advance the public interest, as determined by our public institutions, not special interests.

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[55] United States v. Trucking Employers, Inc., 561 F.2d 313, 317 (D.C.Cir.1977) (internal quotation marks and citation omitted).

Mr. COBLE. Thank you, Mr. Grossman.
Mr. Cruden, you are recognized for 5 minutes.

TESTIMONY OF JOHN C. CRUDEN, PRESIDENT, ENVIRONMENTAL LAW INSTITUTE

Mr. CRUDEN. Thank you. Thank you, Mr. Chairman and Members of the Subcommittee, for inviting me to testify.

I have prepared testimony, which I asked to be placed in the record. Attached to that testimony is a dozen examples of very recent consent decrees involving municipalities, some of them which were amended, which I thought were truly important for your consideration——

Mr. COBLE. Mr. Cruden, is your mic activated? You appear to be a little muffled.

Mr. CRUDEN. I am on now.

Mr. COBLE. That is better.

Mr. CRUDEN. Thank you.

I am the president of the Environmental Law Institute. We do not lobby or litigate. We are an educational and research institution, dedicated to the rule of law.

But before ELI, for 20 years, I led the Department of Justice's effort in environmental enforcement and environmental defense. And so, I have dealt with consent decrees every day of my life while I was there, and I want to speak from that perspective.

And so, let me say at the outset, as an environmental person, two important things. Consent decrees are extremely important. They are important for the rule of law. They are important to get environmental guarantees, and you will see those in the dozen examples that I gave to you, and you should not add any obstacles to those consent decrees.

And second, there are already mechanisms to get amendments to consent decrees: Rule 60 of the Federal Rules of Civil Procedure, which has been the law a long time, given the ways. The Supreme Court has spoken in numerous instances about how you apply Rule 60, making it clear that you give some deference to municipal authorities, but also making it clear that the burden is on those people trying to get out of a consent decree, as it should be.

I have both legal and then just practical concerns based on my experience with consent decrees. Here are my legal concerns.

First of all, there is already a mechanism in the law to change the Federal rules. If you look at 28 U.S.C. 2073, the Judicial Conference has the responsibility of looking at Federal rules. They have already amended Federal Rule 60 four times. That is the right way of going about changing a process like this.

Second, any time you are starting to restrict the ability of Federal judges to act, particularly on things like their injunctive authority with regard to orders, you are really coming up to separation of powers issues, which I believe Congress should look very carefully at before acting.

And then, finally, I actually think that H.R. 3041 restricts the authority of Mayors. I think you are telling Mayors—"your decisions are time limited." They are sovereign authorities as well, and they deserve our respect.

But let me provide some practical considerations. I gave you a number in my prepared testimony. I only want to single out a few.

First of all, in my experience, consent decrees are actually hard to obtain. What you get for a consent decree you all know; finality and certainty. That is what you get. If you don't get finality and certainty, and if I was still at the Department of Justice, I would advise then don't do the consent decree. Just litigate to conclusion. Then you don't have to worry about somebody getting out of the consent decree 4 years later. But that is not good public policy.

If you go down that route; if, in fact, you have what I predict, and that would be that consent decrees would not be used, then you have way more transaction costs. You will have way more attorney fees. Everything will also take a lot longer to do.

There are other disadvantages. Native American groups are bringing some of these enforcement actions, it disadvantages municipalities, which I will get to in a second, and it disadvantages citizen groups that are also bringing these actions because they simply can't wait and see whether or not the municipality is really going to comply with the decree 4 years later.

Now let me say something quickly about municipalities. Many of the consent decrees that I gave you as my examples were consent decrees that took a long period of time because they were expensive. Mayors actually have to get funding. Any uncertainty makes it very difficult for them to get that funding.

And on top of that, I don't think you want to tell Mayors in the United States: "We don't trust you." We trust you, in fact, to have multiyear, multimillion dollar contracts, but we actually don't trust you to enter into consent decrees.

Let me say something quickly about H.R. 3862. I actually think it also creates obstacles to resolution of litigation against the Federal Government, even when an agency is absolutely out of compliance with a congressional mandate.

I strongly believe that adding more obstacles means you will have fewer consent decrees. We have found that judges actually give shorter timeframes, not longer timeframes for these type of actions. So an unintended consequence would be more litigation, and shorter timeframes.

Let me sum up. Federally approved consent decrees are a valuable settlement tool that promote expeditious resolution of cases, save transaction cost, and achieve finality. Any necessary changes should be done through the process already established. I believe these two bills would effectively eliminate the use of consent decrees, undermine enforcement, and make resolution of litigation significantly more expensive and time-consuming.

I look forward to any questions that you might have.

[The prepared statement of Mr. Cruden follows:]

Written Statement of John C. Cruden
President, Environmental Law Institute

Before the U.S. House Committee on the Judiciary
Subcommittee on Courts, Commercial and Administrative Law

Hearing on H.R. 3041, the "Federal Consent Decree Fairness Act," and
H.R. __, the "Sunshine for Regulatory Decrees and Settlements Act of 2012"

2141 Rayburn House Office Building
February 3, 2012

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity extended to me by the Subcommittee to provide my views on H.R. 3041, the "Federal Consent Decree Fairness Act," and related legislation.

I am John C. Cruden, President of the Environmental Law Institute ("ELI"). Prior to assuming this position in July 2011, I served for over twenty years at the Environment and Natural Resources Division, U.S. Department of Justice ("DoJ"), as either the career Deputy Assistant Attorney General or Chief of Enforcement. The Environment and Natural Resources Division, with U.S. Attorneys, is responsible for all environmental enforcement—civil and criminal—in the United States, and also defends the federal government. The Division also has responsibility for federal ligation related to pollution, public lands and natural resources, wildlife, condemnation and inverse condemnation, and Native American cases involving over 100 federal statutes. In that capacity, I personally negotiated or approved hundreds of consent decrees, and I presented argument in court pertaining to consent decrees. Those consent decrees often involved hundreds of millions of dollars, requiring companies, or municipalities, to come into compliance with the law over a series of years on a defined schedule that included stipulated penalties for violations of the agreement. In addition, I have served as the Chairman of the American Bar Association's Section on Environment, Energy, and Natural Resources. My views on the value and role of consent decrees are obviously informed by my government career, but I am not speaking on behalf of the Department. Also, while my testimony is intended in part to advance ELI's educational mission, the views presented here are my own, and do not necessarily reflect the views of ELI's Board of Directors or its members. I will start by explaining the role of the Environmental Law Institute, then turn to the law of consent decrees, before providing an analysis of H.R. 3041.

The Environmental Law Institute

Founded in 1969 and based in Washington, DC, the Environmental Law Institute is a highly respected non-governmental organization that does not litigate or lobby. Our primary mission is to provide the highest quality educational materials, publications, research, and training in the areas of environment, energy, and natural resources. ELI seeks "to make law work for people, places, and the planet," and our institutional vision calls for "a healthy environment, prosperous economies, and vibrant communities founded on the rule of law."

The Institute's staff includes lawyers as well as scientists, and we have worked throughout the United States and around the world. Our flagship publication, the *Environmental Law Reporter*, is the most cited legal journal of its kind. Additionally,

last year ELI presented on average one educational program each week. Internationally, we are best known for providing judicial education on environmental subjects, and we have now completed the training of over 1,000 judges in 23 different countries.

The subject matter of H.R. 3041 touches on several core aspects of ELI's mission and priorities. We have deep institutional expertise in environmental law, and ELI is committed to the U.S. Constitutional foundations on which our environmental law framework stands. We are dedicated to having all parties follow the rule of law. And at the heart of ELI's mission is a desire to make environmental law work—to ensure that laws on paper can be implemented successfully in the real world. To this end, ELI works closely with a wide range of institutions and stakeholders—and especially with states and municipalities, which often find themselves on the front lines of environmental protection. We also promote robust enforcement of the law. Ultimately, the ability of states, localities, federal agencies, NGOs, and other stakeholders to have their voice heard is critical to environmental protection.

I. Current Law Concerning Consent Decrees—Including Their Modification and Termination

Before addressing H.R. 3041, it is important to first understand the legal nature of consent decrees and the context in which they are used. While my own experience is rooted in environmental law, this analysis is equally applicable to a variety of diverse cases affecting state and local parties, including cases relating to prison conditions, race-based affirmative action, discrimination, Medicaid programs, and infrastructure projects.

As stated by then-Attorney General Edwin Meese III in a memorandum to "All Assistant Attorneys General and All United States Attorneys" in 1986:

> Consent decrees are negotiated agreements that are given judicial imprimatur when entered as an order of the court. Because of their unique status as both contract and judicial act, consent decrees serve as a useful device for ending litigation without trial, providing the plaintiff with an enforceable order, and insulating the defendant from the ramifications of an adverse judgment.

The Meese memo required high-level government approval of certain consent decrees. Regulations reflecting this policy appear in the Code of Federal Regulations (28 C.F.R. §§ 0.160-0.163).

Consent decrees are a recognized tool for making environmental laws work. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as Superfund, specifically requires that an agreement concerning remedial action "shall be entered in the appropriate United States district court as a consent decree." That statute further requires that the Attorney General provide an opportunity for public comment before the consent decree is finally approved and entered by the district court. (42 U.S.C. § 9622(d)(1)(A), (d)(2)(B).) It clearly makes settlements, in the form of judicially approved consent decrees, the preferred course of action.

By policy, the U.S. Department of Justice routinely seeks public comment on most consent decrees arising out of enforcement actions. After the parties agree, DoJ "lodges" the consent decree with the court and seeks public comment. Once complete, DoJ then negotiates any necessary changes before requesting that the court "enter" the consent decree. The legal standard for the court to apply is that the consent decree is "reasonable, faithful to the statute's objectives, and fair (both procedurally and substantively)." *United States v. Charles George Trucking Inc.*, 34 F.3d 1081, 1084 (1st Cir. 1994). *See also Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525-26 (1986). Once entered, the consent decree becomes a judicial order and can be enforced in a court of law like any other judicial order. Judges can, and frequently do, hold hearings, seek evidence, or inquire of the parties the meanings of specific terms before they agree to enter a consent decree. And consent decrees are occasionally rejected by courts. *See* John C. Cruden & Bruce S. Gelber, "Federal Civil Environmental Enforcement: Process, Actors, and Trends," 18 *Nat. Resources & Env't* 10 (2004).

Sometimes, of course, consent decrees arise not in the context of federal enforcement actions, but in circumstances where the United States is a defendant. For example, agency decisions may be challenged under the Administrative Procedure Act: "Agency Action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Specifically, "[t]he reviewing court shall," among other actions, "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Other sections of Title 5 control rulemaking (553), the record on review (2347), intervention (2348), court of appeals jurisdiction (2349), and review in the Supreme Court (2350).

Litigants may challenge an agency for failing to conduct timely rulemaking when there is a clear congressional dictate and a mandatory duty to do so, or they may challenge completed rulemaking as arbitrary and capricious. The United States frequently resolves such lawsuits with a consent decree or settlement agreement in which the parties agree to dismiss the litigation and the agency agrees to a rulemaking schedule, process, or amendment. A challenge to a lack of a prescribed regulation, for

instance, may result in a settlement or consent decree wherein the parties agree simply to a date for producing a proposed and then final regulation. A challenge to an existing regulation may be settled by the agency agreeing to propose an amendment to the regulation, but preserving its discretion after appropriate notice and comment to decide either not to make any change, or to make different changes. If an agency proposes changes to an existing regulation, there will be an opportunity for public notice and comment on the proposed regulation, as well as an opportunity to challenge any final regulation in court. *See* Jeffrey M. Gaba, "Informal Rulemaking by Settlement Agreement," 73 *Geo. L.J.* 1241 (1985); Jim Rossi, "Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement," 51 *Duke L.J.* 1015 (2001).

There are several ways in which a consent decree can be changed or amended after a court has approved it. First, and most commonly, the parties can simply agree on changes and seek permission of the court to amend the consent decree. Second, the Federal Rules of Civil Procedure (or "FRCP"), which are binding on all courts, include a separate rule, Rule 60, to afford "Relief from a Judgment or Order," which covers consent decrees along with other final judgments. Rule 60 provides for (a) corrections of clerical mistakes, oversights, or omissions in orders; and (b) grounds for relief from a substantive error in a final judgment, including mistake, newly discovered evidence, and fraud.

Most relevant to today's discussion, Rule 60(b)(5) and (b)(6) already allow a petitioner relief on a variety of grounds: if "the judgment has been satisfied, released, or discharged; [if] it is based on an earlier judgment that has been reversed or vacated; [if] applying it prospectively is no longer equitable; or [if] any other reason [] justifies relief." There are numerous cases in every court of appeals and in the U.S. Supreme Court construing and applying Rule 60 to final judgments, including consent decrees.

The grounds for modifying a judgment under Rule 60 are far from new: the rule is rooted in traditional principles of equity. A court issuing a forward-looking judgment has always possessed inherent authority to modify that judgment if circumstances change. Rule 60 merely regularized the procedures by which parties may seek relief, and codified some specific types of changed circumstances that historically have prompted courts to modify judgments.

Significantly, the Rule 60 standard is flexible and allows the court to consider a variety of factors like the importance of finality, the sanctity of a consent decree as a contract, the public interest, and whether the changed circumstances were foreseen. In cases of changed circumstances, Rule 60 leaves the ultimate decision of whether to modify or set aside a judgment within the court's discretion, as guided by sound legal and equitable principles and informed by the positions of the parties. Under Rule 60,

the burden lies with the party seeking relief to demonstrate that subsequent changes in circumstances have rendered a judgment unjust. This scheme recognizes and promotes the need for finality: if it were too easy for parties to overturn orders, the value of consent decrees as reliable, final methods of case settlement would be greatly diminished.

The Supreme Court in several cases has discussed the use of Rule 60(b) to modify ongoing consent decrees. In *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the Court confirmed that the Rule creates a "flexible standard" that is particularly well suited to complex decrees involving government institutions. But the Court stressed that flexibility does not simply mean "when it is no longer convenient to live with the terms of a consent decree;" and accordingly it held that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree."

More recently, in *Frew v. Hawkins*, 540 U.S. 431 (2004), a unanimous Court reaffirmed that Rule 60(b)(5) provides the established, equitable path for modifying consent decrees, and also held that this approach does not offend state sovereignty. While a federal court should "'give significant weight'" to the views of state and local officials who are operating under a consent decree, the burden remains on the moving party to establish reason to modify the decree. "[W]here it has not done so," Justice Kennedy wrote, "the decree should be enforced according to its terms."

Simply put, the Supreme Court has spoken to the issue of modifying consent decrees: when circumstances change, a state or municipality has a clear and ready means of seeking termination or an appropriate modification from the court.

II. There Is a Mechanism for Amending the Federal Rules of Civil Procedure, When Necessary

Even assuming that Rule 60(b) is somehow no longer up to the task of ensuring proper modification or termination of consent decrees, there is an established, bipartisan, well respected way to amend the Federal Rules of Civil Procedure: through the Judicial Conference of the United States. The Judicial Conference, as the national policy-making body for the federal courts, was established by Congress and is composed of federal judges from each judicial circuit, the chief judge of the Court of International Trade, and the Chief Justice of the United States. It promotes judicial uniformity, fairness, simplicity, and efficiency in the rules that govern the courts. A key feature of the Judicial Conference is the Committee on Rules of Practice and Procedure (also known as the "Standing Committee"), which oversees the practical aspects of

proposing and changing rules. The Judicial Conference also has authorized the appointment of advisory committees to recommend rule amendments. 28 U.S.C. §§ 331, 2071-77.

Congress has established robust procedures for amending the Federal Rules of Civil Procedure that have served for almost eighty years. The process includes the participation of court experts, the public, and two co-equal branches of government. Any member of the public may submit a proposed rule change to the Civil Rules Advisory Committee for its consideration. If the Advisory Committee approves of the suggestion, it will prepare a draft rule amendment. With the Standing Committee's approval, the draft amendment is published and opened to comment for six months, during which time members of the public have the opportunity to submit comments and participate in one or more public hearings on the proposal. Following the comment period, the Advisory Committee reconsiders the proposal in light of public input. The Advisory Committee, Standing Committee, Judicial Conference of the United States, U.S. Supreme Court, and Congress must then each approve the proposed amendment before it can take effect. This deliberative, collaborative process for amending the Federal Rules gives due regard both to the complex nature of procedural rules and to the great impact they can have on the administration of justice and the proper functioning of the courts. Indeed, this process has already been used four times to change Rule 60 since its adoption.

III. H.R. 3041 Presents Legal Concerns

As H.R. 3041 would (1) essentially modify the Federal Rules of Civil Procedure by adding new grounds and procedures for relief from a consent decree; (2) place limits on federal courts' traditional equitable jurisdiction and discretion, and contravene Supreme Court precedent; and (3) make it more difficult for states and municipalities to achieve settlement in practice, there are important legal concerns about the proposal.

First, this bill would have the effect of circumventing the process for modifying the Federal Rules. It would place a gloss on Rule 60(b) that—if truly necessary—would best be accomplished through the available Judicial Conference process.

Second, bypassing that process means that Congress would be directly dictating procedures to and limiting the jurisdiction of the federal courts—something that should never be done lightly. This is especially true when dealing with injunctive remedies, which derive from courts' centuries-old inherent equitable power to enforce their own judgments and modify them as circumstances require.

To create an artificial, external timetable for motions to modify consent decrees; shift the burden of proof away from the party that has already agreed to operate under the decree; and require courts repeatedly to revisit all the agreed-upon provisions is to interfere substantially with courts' equitable power, and to undermine their ability to provide final relief. It also would upset the careful federal-state balance struck by the Supreme Court in *Rufo* and *Frew*. Indeed, while the findings contained in H.R. 3041 cite the *Frew* opinion at length, the bill ignores the fact that the justices unanimously found existing Rule 60(b) to be a sufficiently flexible accommodation to state and local sovereignty, not a threat to it.

Third, creating new obstacles to reaching settlements, and giving subsequent officials excessive leeway to modify or even vacate prior agreements, actually can do as much to undermine state and local sovereignty as to preserve it. It is true that, as Justice Kennedy wrote in *Frew*, a state or municipality "depends upon successor officials, both appointed and elected, to bring new insights and solutions. . . ." But that observation alone was not enough for the Court to alter a party's burden of proving that the equities have tipped in its favor before that party is allowed to rescind its prior sovereign obligations.

As the Court has repeatedly said, consent decrees are both judicial decrees and contracts, and entering into binding contracts is one of a sovereign's defining functions. A state or municipal government's authority to commit itself to future actions both validates its existence and dignity as a continuing entity, and serves practical purposes, such as the ability to obtain long-term financing, which I will discuss below. The proposed legislation would require courts to tip the scales in favor of undoing extended commitments and projects and would call the sovereign's credibility into question, thus likely depriving state and local governments of this important tool in the future.

IV. H.R. 3041 Will Have Adverse and Unintended Practical Consequences

As a practical matter, there are at least seven major adverse and unintended consequences of this legislation. The result will be to undermine environmental enforcement, add significantly to transaction costs for states and municipalities, and create enormous uncertainty. While these adverse consequences would occur in all litigation, not just environmental matters, they would be particularly acute in environmental cases. Unlike other areas of the law, environmental remediation is often a lengthy process, requiring scientific analysis, sophisticated engineering, and quality assurance in order to be successful. Environmental actions can frequently involve complex activities, such as the dredging of contaminated sediments from swift flowing rivers; the installation of sophisticated pollution-abatement equipment on pollution

sources that are in use; upgrades to Public Owned Treatment Works that are vitally needed; or the repair of damaged wetlands or beaches that were oiled after a spill, as evidenced by the recent disaster in the Gulf of Mexico. One area where there are frequent consent decrees, which I will use as an example of the potential problems with H.R. 3041, is municipal Clean Water Act enforcement actions.

In every Administration in the last twenty years there has been enforcement against municipalities for violations of the Clean Water Act, principally from inadequate or outdated sewer and stormwater infrastructure. There are countless examples of raw sewage running through streets, entering people's basements, and flooding neighborhoods. Although the legal liability for these unpermitted discharges is often quite clear, the actions needed to remedy the problem are expensive and time-consuming. In most instances the municipality needs to completely study the causes of the problem, develop a mufti-faceted plan, and then undergo a lengthy and expensive remedial project.

Because the municipality will need to raise money for such a project, and the engineering is important, the "combined sewer overflow" consent decrees legitimately take over a decade to complete, with complex projects taking even more time. It is also not uncommon for the parties to agree to amend these consent decrees during their life, to take into account better methods that may be less expensive, or to extend time when unforeseen problems have emerged. There are also unexpected, *force majeure* events, such as was experienced by the City of New Orleans in the aftermath of Hurricane Katrina, which allow the municipality to not have to comply with affected consent decree requirements. One important aspect of this type of enforcement is that Congress has mandated that States be a party to this litigation. 33 U.S.C. § 1319(e). Accordingly, H.R. 3041 would adversely impact States, acting as significant enforcers of environmental laws.

Although virtually all of the municipal Clean Water Act cases over the past two decades have settled with a consent decree, nearly all of them have lasted for over four years. Examples of such consent decrees appear in the "Illustrative List of Recent Consent Decrees" at the end of this written statement. The proposed legislation would likely adversely affect all parties to these and other kinds of environmental settlements in the manner described below.

1. An End to the Effective Use of Court-Approved Settlements

Because H.R. 3041 would allow municipalities to withdraw from a consent decree at various times, it is very likely that those charged with enforcing the nation's

laws—the federal government, states, tribes, and citizens—will forgo the newly uncertain path of the consent decree and simply pursue court-adjudicated decisions. This legislation eliminates a key benefit of the consent decree: finality and certainty. Since any future administration could move to withdraw, requiring the original plaintiff to establish evidence that then might be years old, it is quite likely that consent decrees will simply not be pursued. That is true even though a municipal defendant may well want to settle, may have the resources to settle, and it may well be in the public interest to achieve settlement and immediately start remedying the environmental harm. Instead, it is far more likely that discerning plaintiffs, concerned that any agreement they reach will prove illusory, may well decide to seek the finality of a judicial determination.

Full-fledged judicial determinations would not be bound by any artificial time limit and would be more time consuming, more expensive to obtain, and far more proscriptive. Consent decrees, on the one hand, provide flexibility, allow innovative and less costly solutions, and encourage the parties to work together in implementation. Judicial orders, on the other hand, are always directed at the defendant and leave less room for innovation.

2. *Increased Litigation, Attorney Fees, and Transaction Costs for All Parties*

If state, federal, or citizen plaintiffs cannot be certain that consent decree terms can or will be met, then the most likely outcome will be that they simply do not seek settlement. These parties are absolutely entitled to seek discovery, take depositions, require expert reports, prove liability, and then seek a remedy directed by the court. If so, the time limitations of H.R. 3041 simply do not apply. Since litigation is already quite expensive, often resulting in millions of dollars of transaction costs, having legislation that would undoubtedly result in increased litigation is not in the public's best interest. Congress has repeatedly emphasized its preference for settlements in a variety of statutes. Under the Alternative Dispute Resolution Act of 1998 (28 U.S.C. §§ 651 et seq.), every federal court in the country now has an alternative dispute program to encourage settlement and reduce court caseloads. H.R. 3041 would undermine this important public policy goal.

The increase in litigation would also bring new demands on our already over-burdened court system. In addition, these types of cases are often the most time-consuming and expensive to litigate, since the relief necessarily will extend for years and will be based on expert testimony, municipal finances, and the nature of the environmental harm.

3. Undermining Authority and Increasing the Costs for Municipalities

Another unintended consequence of the legislation would be to significantly disadvantage a municipality by increasing its transaction costs. First, to obtain financing for large engineering projects, a municipality must obtain outside financing based on the estimated time of completion, the certainty of the project, and the guarantee that the municipality will meet the terms of the financing agreement, no matter who is the elected or appointed leader. Legislation that would allow subsequent municipal leaders to disavow the municipality's prior commitments and attempt to avoid their legal requirements would make it extremely difficult for a municipality to obtain the financing that it will need.

In addition, federal, state, or citizen plaintiffs that do continue to negotiate consent decrees may come to demand unrealistic time frames, such as no more than four years, in order to assure that the consent decree terms will be met. If so, the short-term costs will dramatically increase. Every municipality that I have negotiated with has sought time in excess of four years, stressing the need for good initial studies, citizen involvement, and a quality output. This legislative proposal could inadvertently undermine those laudable goals.

Finally, an important part of the sovereignty of a state or municipality is the ability to make binding contracts, resolve litigation with finality, and speak with authority. No Governor would be able to successfully contract with private entities if there was the possibility that the State, under another administration, could easily renege on their contract requirements. An unintended potential consequence of H.R. 3041 would be to undermine municipal authority.

4. Disadvantaging Native American Tribes

Native American tribes also bring enforcement actions in their sovereign capacity, or lawsuits to protect their waters, resolve boundary disputes, or obtain rights guaranteed by treaties. Those actions are often settled with agreements in the form of consent decrees, which can last for decades. *See*, for instance, the Michigan case described in the "Illustrative List of Recent Consent Decrees" at the end of this written statement. Tribes are often acting with few resources to support litigation seeking protection over their homeland, access to drinking water, or resolution of their hunting and fishing rights. Because treaty rights frequently require extensive historical documentation and the use of expert testimony, they can be quite expensive if a trial is necessary. Consent decrees, on the other hand, allow the Tribe and state or municipality to cooperatively resolve and then implement any agreement.

5. Disadvantaging Local Citizen Groups and Citizen Enforcement

In environmental laws, Congress has created a specific and quite important role for local citizens to assure compliance with the law. Lawsuits brought by local groups or individuals assure compliance with the law, serve to deter illegal conduct, and are a uniquely American legal remedy that affords citizens a role in protecting their local environment. In many of the municipal sewer overflow cases described in the "Illustrative List of Recent Consent Decrees," the lawsuit was originally brought by a citizen group concerned about untreated sewage entering drinking water sources or leaking into their basements. Many times the citizens joined with states to seek corrective action, as they lacked sufficient resources to fully litigate a case to conclusion. Consent decrees provide an option for a faster, less expensive, but still comprehensive resolution of a dispute. Obtaining a consent decree with a municipality frequently allows for faster cleanup, thereby improving the environment in a more expeditious fashion. Citizen groups, however, must have certainty when they resolve their case, as they will often not be in a position to re-litigate the matter in future years. Again, an unintended consequence of H.R. 3041 would be to undermine citizen suit enforcement.

6. Not Accomplishing the Intended Purpose

Even in cases where parties did agree to a consent decree, and the consent decree were to be vacated under the authority of H.R. 3041, little would ultimately be accomplished. Ongoing violations of, for instance, the Clean Water Act are still a violation of law and would still need to be resolved. A federal court would retain jurisdiction over a filed case, and the parties would simply re-enter the litigation process. Now, of course, a new settlement would be virtually impossible to achieve, and the parties would go through the entire litigation process to resolve liability and have the court determine new injunctive relief. During that time period the violations of law would continue, the ultimate relief would probably be more costly to achieve, and the attorney fees and transaction costs would multiply.

7. Creating New Environmental Problems

If a municipality, having agreed to a major engineering project such as sewer removal and upgrading, were successful in getting out of their agreement after four years, this would create other significant problems. First, the partially completed engineering project could itself be a public nuisance. Second, the costs of restarting

such a process would result in substantially increased costs and a longer time frame to completion. Finally, the existence of an unfinished project could itself add environmental liability, as partially completed sewer lines spew additional untreated sewage into the Nation's waters or citizen's basements.

Conclusion

Federally approved consent decrees are valuable settlement tools that promote expeditious resolution of cases, save transaction costs for all parties and for the court, and achieve finality while protecting the parties to the agreement. Existing federal law, together with relevant Supreme Court decisions, provide methods for modifying consent decrees. Any truly necessary changes to the Federal Rules should be achieved through the process that has been established for doing so. H.R. 3041 raises significant legal concerns and would have unintended real-world consequences that risk undermining enforcement, disadvantaging municipalities, and making resolution of litigation significantly more expensive and time-consuming.

Illustrative List of Recent Consent Decrees

Following are examples of consent decrees into which the Department of Justice has entered during the last several years. These descriptions are drawn directly from press releases issued by the Department.

- *Chicago (2011)—Clean Water Act*

The United States entered into a settlement with the Metropolitan Water Reclamation District of Greater Chicago (MWRD) to resolve claims that untreated sewer discharges were released into Chicago-area waterways during flood and wet weather events. The settlement is intended to safeguard water quality and protect human health by capturing stormwater and wastewater from the combined sewer system, which services the city of Chicago and 51 communities. MWRD will complete a tunnel and reservoir plan to increase its capacity to handle wet weather events and address combined sewer overflow discharges. The project will be completed in a series of stages in 2015, 2017, and 2029. The settlement also requires MWRD to control trash and debris in overflows using skimmer boats to remove debris from the water so it can be collected and properly managed, making waterways cleaner and healthier.

- *Newport (2011)—Clean Water Act*

The city of Newport has agreed "to eliminate illegal discharges of sewage into Narragansett Bay from its wastewater treatment plant and wastewater collection system. The settlement is the result of a federal and state enforcement action brought by the U.S. Department of Justice, on behalf EPA, the State of Rhode Island through the Rhode Island Department of Environmental Management, and the National Environmental Law Center on behalf of Environment Rhode Island and certain Rhode Island citizens. The consent decree alleged that Newport violated the federal Clean Water Act, including illegal discharges of sewage and stormwater containing bacteria and other pollutants that pose threats to human health and the environment.

- *St. Louis (2011)—Clean Water Act*

The Metropolitan St. Louis Sewer District (MSD) agreed last August to make extensive improvements to its sewer systems and treatment plants, at an estimated cost of $4.7 billion over 23 years, to eliminate illegal overflows of untreated raw sewage, including basement backups, and to reduce pollution levels in urban rivers and streams. The settlement reached between the United States, the Missouri Coalition for the Environment Foundation and MSD, requires MSD to install a variety of pollution controls, including the construction of three large storage tunnels ranging from approximately two miles to nine miles in length, and to expand capacity at two treatment plants. These controls and similar controls that MSD has already implemented will result in the reduction of almost 13 billion gallons per year of

overflows into nearby streams and rivers. MSD will also be required to develop and implement a comprehensive plan to eliminate more than 200 illegal discharge points within its sanitary sewer system. Finally, MSD will engage in comprehensive and proactive cleaning, maintenance and emergency response programs to improve sewer system performance and to eliminate overflows from its sewer systems, including basement backups, releases into buildings and onto property. The settlement resolves claims brought by the United States in a lawsuit in which the Missouri Coalition for the Environment Foundation later intervened under the citizen suit provisions of the Clean Water Act. The United States alleged that on at least 7,000 occasions between 2001 and 2005, failures in MSD's sewer system resulted in overflows of raw sewage into residential homes, yards, public parks, streets and playground areas.

- *Jersey City (2011)—Clean Water Act*

A settlement between the United States and the Jersey City, N.J. Municipal Utilities Authority (JCMUA) is intended to resolve alleged Clean Water Act violations by JCMUA for failing to properly operate and maintain its combined sewer system. These included releases of untreated sewage into the Hackensack River, Hudson River, Newark Bay and Penhorn Creek. Under the settlement, JCMUA is required to comply with its Clean Water Act permit and will conduct evaluations to identify the problems within the system that led to releases of untreated sewage. JCMUA will also complete repairs to approximately 25,000 feet of sewer lines over the next eight years. Finally, JCMUA will invest $550,000 into a supplemental environmental project that will remove privately owned sewers from homes in several neighborhoods in Jersey City and replace them with direct sewer connections, creating better wastewater collection in those areas.

- *Evansville (2011)—Clean Water Act*

The city of Evansville, Indiana agreed to make extensive improvements to its sewer systems that are expected to significantly reduce the city's longstanding sewage overflows into the Ohio River in a comprehensive Clean Water Act settlement with federal and state governments, the Justice Department, the U.S. Environmental Protection Agency, and the state of Indiana. Evansville's sewer system has a history of maintenance and system capacity problems that result in it being overwhelmed by rainfall, causing it to discharge untreated sewage combined with storm water into the Ohio River. Under the settlement, the city will improve operation and maintenance, as well as develop and implement a comprehensive plan to increase capacity of its sewer system to minimize, and in many cases, eliminate those overflows. Costs may exceed $500 million. The plan must be fully implemented by calendar year 2032 or 2037, depending on Evansville's financial health. Additional measures to improve the capacity, management, operation, and maintenance of its separate sanitary sewer system to eliminate overflows of untreated sewage will begin immediately. Also, the

city will take immediate steps to upgrade the treatment capacity of its two-wastewater treatment plants. The measures undertaken by the city of Evansville and required by today's settlement will help eliminate over four million pounds of pollutants and hundreds of millions of gallons of untreated overflows discharged into the Ohio River and Pigeon Creek every year.

- *Saginaw Chippewa Indian Tribe of Michigan (2010)—Settlement between State and Tribe*

The Saginaw Chippewa Indian Tribe of Michigan and the United States settled a longstanding dispute with the State of Michigan over the boundaries of the Isabella Reservation. As part of the settlement, the Tribe, State of Michigan, City of Mt. Pleasant, and Isabella County also executed various intergovernmental memoranda of agreement to improve the parties' interactions regarding day-to-day matters, such as taxation, regulation, land use, law enforcement, and the Indian Child Welfare Act.

- *Indianapolis (2010)—Clean Water Act (Amended Consent Decree)*

The United States and the state of Indiana reached an agreement with the city of Indianapolis to amend a 2006 consent decree that will make Indianapolis' sewer system more efficient, leading to major reductions in sewage contaminated water at a savings to the city of approximately $444 million. Prior to 2006, the city of Indianapolis and its 800,000 residents experienced Combined Sewer Overflows (CSO's) totaling approximately 7.8 billion gallons per year. A consent decree approved by a federal court in 2006 required the city to construct 31 CSO control measures, including a 24-million gallon capacity shallow interceptor sewer, to reduce the city's overflows to approximately 642 million gallons per year. With the proposed changes, the city is now expected to reduce the amount of total annual discharge to about 414 million gallons, a significant improvement from the 642 million gallons that were expected under the original consent decree, and reduce the cost of the project by about $444 million. The project's modifications would also result in an accelerated construction schedule to capture 7 billion gallons of CSO discharges and their associated disease-causing organisms.

- *City and County of Honolulu (2010)—Clean Water Act*

The City and County of Honolulu signed a consent decree intended to address Clean Water Act compliance at Honolulu's wastewater collection and treatment systems. The other parties were the Justice Department, U.S. Environmental Protection Agency, Hawaii Attorney General's Office, Hawaii Department of Health, the Sierra Club, Hawaii's Thousand Friends, and Our Children's Earth Foundation. The consent decree includes a comprehensive compliance schedule for the city to upgrade its wastewater collection system by June 2020. Under the settlement, the Honolulu wastewater treatment plant will need to be upgraded to secondary treatment by 2024. The Sand

Island plant will need to be upgraded by 2035, but could be extended to 2038 based on a showing of economic hardship. Work on the wastewater collection system will include rehabilitation and replacement of both gravity and force main sewer pipes, backup strategies to minimize the risks of force main spills, a cleaning and maintenance program, improvements to Honolulu's program to control fats, oils and grease from entering into the wastewater system from food establishments, and repair to pump stations. The city will be paying a total fine of $1.6 million to be split between the federal government and the state of Hawaii to resolve violations of the Clean Water Act and the state of Hawaii's water pollution law, such as the March 24, 2006 Beachwalk force main break that spilled approximately 50 million gallons of sewage into the Ala Wai Canal.

- *Williamsport (2010)—Clean Water Act*

The Williamsport, Pa., Sanitary Authority (WSA) agreed to make significant improvements to its combined sewer system at an estimated cost of approximately $10 million, in order to resolve long-standing problems with combined sewer overflows to the Susquehanna River, which flows to the Chesapeake Bay. Under the consent decree, WSA will expand the treatment capacity of its Central Wastewater Treatment Plant and increase its storage capacity to cope with high flow during wet weather to guard against combined sewer overflows to the West Branch of the Susquehanna River, and ultimately, the Chesapeake Bay. The Commonwealth of Pennsylvania was a co-plaintiff. When fully implemented, this agreement is expected to reduce the amount of untreated sewage being discharged into the Susquehanna River by more than 52 million gallons per year.

- *Kansas City (2010)—Clean Water Act*

The city of Kansas City, Mo., agreed to make extensive improvements to its sewer systems, at a cost estimated to exceed $2.5 billion over 25 years, to eliminate unauthorized overflows of untreated raw sewage and to reduce pollution levels in urban storm water. The consent decree requires the city to implement the overflow control plan, which is the result of more than four years of public input. The plan is designed to yield significant long-term benefits to public health and the environment, and to provide a model for the incorporation of green infrastructure and technology toward solving overflow issues. When completed, the sanitary sewer system will have adequate infrastructure to capture and convey combined storm water and sewage to treatment plants. This will keep billions of gallons of untreated sewage from reaching surface waters. Kansas City will spend $1.6 million on supplemental environmental projects to implement a voluntary sewer connection and septic tank closure program for income-eligible residential property owners who elect to close their septic tanks and connect to the public sewer. Since 2002, Kansas City has experienced approximately 1,294 illegal sewer overflows, including at least 138 unpermitted combined sewer

overflows, 390 sanitary sewer overflows, and 766 backups in buildings and private properties. The overflows are claimed to be in violation of the federal Clean Water Act and the terms of the city's National Pollution Discharge Elimination System (NPDES) permits for operation of its sewer system. Kansas City's overflows result in the annual discharge of an estimated 7 billion gallons of raw sewage into local streams and rivers, including the Missouri River, Fishing River, Blue River, Wilkerson Creek, Rocky Branch Creek, Todd Creek, Brush Creek, Penn Valley Lake, and their tributaries.

- *Puerto Rico (2010)—Clean Water Act, Safe Drinking Water Act*

The Puerto Rico Aqueduct and Sewer Authority (PRASA) agreed to implement major capital improvements and upgrades to resolve alleged longstanding violations of the Clean Water Act at 126 drinking water plants across the island and violations of the Safe Drinking Water Act at three others. Most of the communities served by the drinking water treatment plants that will be upgraded under the agreement are in low-income communities. The consent decree requires PRASA to implement measures to properly handle harmful pollution from 126 drinking water treatment plants that discharge into Puerto Rico's lakes, rivers and streams, some of which are sources of drinking water. The work required by the agreement, when fully implemented by PRASA, is estimated to cost more than $195 million. Under the consent decree, PRASA will implement multiple capital improvement projects and other upgrades at 126 drinking water treatment plants and related systems over the next 15 years. PRASA will complete 291 short-, mid-, and long-term capital improvement projects, which will include the construction of 34 treatment systems at facilities that currently are discharging untreated sludge into local waterways, installation of flow meters and high-level indicators at all PRASA facilities, improvements to sampling locations, capacity evaluations at over 50 facilities, implementation of an island-wide preventive maintenance program and facility operator training. PRASA's efforts to improve the water quality of either Lake Toa Vasa or both Lake Toa Vaca and Lake Cidra will address the growing amount of nutrients in the lakes, both of which are drinking water sources for portions of Puerto Rico. Increased levels of nutrients in water bodies can severely impact ecosystems and human health.

- *New Orleans (2010)—Clean Water Act (Amended Consent Decree)*

The Sewerage & Water Board of New Orleans agreed to reinstate its comprehensive program—stalled for several years in the aftermath of Hurricane Katrina—to make extensive improvements to reduce or eliminate sewage overflows into the Mississippi River, Lake Pontchartrain and its storm drainage canal system. According to a 1998 agreement, the Sewerage & Water Board, which operates the publicly owned treatment works that serves the citizens of New Orleans, has agreed to continue to repair its antiquated sewage collection system. Prior to 1998, the system had been overwhelmed causing overflows of raw sewage into waterways and streets of

New Orleans. Those efforts were put on hold for several years due to Hurricane Katrina in 2005. As part of its ongoing remediation program, estimated to cost more than $400 million from its inception in 1998, the board has agreed to repair all of its 62 pump stations damaged by the hurricane, as well as any other hurricane damage in the portions of the collection system served by those pump stations. By no later than July 2015, the board will complete additional studies required by EPA and make all necessary repairs and upgrades to its collection system, including measures designed to provide dependable electrical services at its treatment plant in the event of a future catastrophic event. The 1998 agreement resolved a 1993 lawsuit brought by the United States alleging violations of the Clean Water Act including effluent overflows at the East Bank treatment plant and unauthorized discharges from the East Bank Collection System. A coalition of citizens groups under the direction of the Tulane Law Clinic has joined the government in the action and is part of the modified settlement. The state of Louisiana also participated in the settlement.

- *Other Municipalities and Localities (Various Years)*

In the past, the United States has reached agreements with numerous municipal entities across the country, including: Jeffersonville, Ind.; Fort Wayne, Ind.; Indianapolis, Ind.; Nashville, Tenn.; Mobile, Ala.; Jefferson County (Birmingham), Ala.; Atlanta; Knoxville, Tenn.; Miami; New Orleans; Toledo, Ohio; Hamilton County (Cincinnati), Ohio; Baltimore; Los Angeles; Louisville, Ky.; and northern Kentucky's No. 1 Sanitation District.

Mr. COBLE. Thank you, gentlemen, very much for your contributions to today's hearing.

Now we try to comply with the 5-minute rule as well. So if you all will keep your responses terse, we would be appreciative to you for that.

Mr. Martella, would H.R. 3862 procedures be effective in limiting abuses of consent decrees and settlement agreements to advance special interests' regulatory agendas, and why?

Mr. MARTELLA. Thank you, Mr. Chairman.

I believe that H.R. 3862 would be a significant step in the right direction of addressing the concerns we have been talking about, that basically groups are working with the Government to reach settlement agreements kind of outside of the transparent public participation realm and effectively reallocating Government resources and priorities, working in something of a quasi-governmental function.

The proposed bill would address all of those concerns by introducing a guarantee of public participation and notification of such agreements. By allowing the public to be part of that, and one of the ideas of the bill that I think should really be commended, the notion that if someone intervenes in one of the cases, they would have an opportunity to be at the settlement table with the mediator. And in my view, that will actually result in a better government because all the considerations will be accounted for in that settlement agreement.

So, for a number of reasons, I think the bill would be a strong step in the direction of addressing those concerns.

Mr. COBLE. I concur with that.

Would you say, Mr. Martella, that a significant number of important Federal regulations are promulgated under the sue and settle consent decrees and settlement agreements?

Mr. MARTELLA. I think every year it is a higher and higher percentage. The trend is definitely that the regulatory agendas of several agencies, the EPA in particular, seems to be driven as much by the influence of outside groups as it is by Congress and the agency's own priorities. This is becoming an increasing trend every single year.

Mr. COBLE. Thank you, sir.

Mr. Schoenbrod, does H.R. 3041 go beyond the Supreme Court's decision in Horne, or does it simply clarify the rule that the court tried to articulate in that case?

Mr. SCHOENBROD. It clarifies the rule that the Supreme Court laid down in Horne. It clarifies the basic idea. The problem with Horne, the reason why Rule 60(b)(5) is not a workable mechanism for changing decrees is that Horne is so confusing in terms of how you actually implement the principle that protect rights, but yet give flexibility.

In Horne itself, which was remanded to the District Court in 2009, there is yet to be a decision. And remember, the motion to modify the decree was started several years earlier. So you are talking 5, 6 years to get a change in public policy when life changes every day.

There are literally thousands of these decrees and, in fact, only something less than 30 reported cases using Horne. We have a broken system, and there is nothing wrong with Congress fixing it directly.

Congress, without the Judicial Conference, enacted the Prison Litigation Reform Act. It was upheld in *French v. Miller*. Congress could do that.

Now, Mr. Cruden raises the issue of Department of Justice decrees in cases against State and localities. I think there is a different question when you have Department of Justice actions against States and localities.

In cases like pollution control versus the kind of institutional reform cases that is the focus of the idea of the Prison Litigation Reform Act—excuse me, the Federal Consent Decree Fairness Act. And indeed, in a previous version of the bill, there was a carve-out for Department of Justice enforcement actions. That may be sensible to deal with the kind of concerns that Mr. Cruden raises. But otherwise, we need this bill.

Mr. COBLE. Thank you, sir.

I am going to move along, trying to beat the House floor vote, which is imminent.

I am going to recognize the distinguished gentleman from Tennessee, the Ranking Member, Mr. Cohen.

Mr. COHEN. Thank you. Thank you very much.

I think the genesis of a lot of this legislation came from Tennessee, and it was introduced by Senator Alexander. And it was a result of the TennCare case, which is our Medicaid, where there was a very bright, committed, and determined plaintiff's lawyer arguing on behalf of the poor, who had very little in the way of healthcare from a State that depends on the sales tax as its foundation for its budget, which makes it regressive, inadequate to have the monies to take care of the poor and yet drawn in such a way as to affect them in a most disadvantaged manner because it is regressive.

And a Governor at the time who was a brilliant man, who is a healthcare expert, and thinks that nobody is better than him. And so, it set for a very difficult situation. And there was the immovable object and the irresistible force with Mr. Bonnyman and Governor Bredesen.

The fact is, as I looked at it, and I understood the problems with the consent decree, there was really nobody speaking for the poor and the sick but Mr. Bonnyman. And there was a need for that consent decree, and that—the Governor didn't want to have it. He thought he knew how to do everything. He certainly didn't.

As I look at this and I listen to Mr. Cruden, who has got all this experience, I just think that if you had a Governor like that or any Governor who didn't want to get into a consent decree and their term was going to come up, you would have attorneys on the defense side who would just engage in dilatory tactics to try to spread the thing out to get close as they could to the end of that Governor's term before they got to anything, and therefore, there would be nothing.

And there really would be no incentive for the plaintiffs, who want to help the people that need healthcare to enter into a consent decree because it could be turned around at the end of the term or in 4 years, whichever comes first. So the loser in the case would always be speedy justice and the aggrieved party.

I don't understand it. Mr. Cruden, maybe you could explain. These bills all, both of them, say that the plaintiff would have to come in and justify their actions. Why should it be that the folks who are citizens, who are aggrieved, who are being denied rights

guaranteed them by their Constitution or their government and have been denied them, have to come back just because there has been a change in the leader?

The factors that led to the deprivation of rights, doesn't it seem like the State, in its new incarnation with the election, should have to at least show why it is now some superior position and doesn't need to be chastised and reprimanded and forced to do what they should have done because of their wonderful spirit and souls?

Why shouldn't it be the other way around, that the defendants have to come in and show the court why you don't need the consent decree? Doesn't it say that the plaintiffs have to come and prove that it has to be continued?

Mr. CRUDEN. If you think about it, Congressman, in some ways consent decrees are like a contract. Everybody is coming together and having a contract that everybody did in good faith. Everybody made promises. Everybody said, "I will live by this."

But the person that wants to get out of that contract ought to bear the burden of trying to show why that is appropriate. Why isn't that true now? If there are different circumstances, if there are different facts, if the world has changed, okay. But it ought to be the burden—just like every Supreme Court decision that has been mentioned says that. The burden is on the person trying to get out of the deal that at some stage somebody promised that they were going to do.

Mr. COHEN. So why isn't that a better idea, Professor? You want—I see you are putting your finger to the mike. I appreciate your interest. Why isn't that a better idea than having the plaintiffs have to come forth, normally who have less resources and have to come in and show why justice should continue?

Mr. SCHOENBROD. Justice Brennan wrote that "nothing would so jeopardize the legitimacy of our system of government that relies upon the ebbs and flows of politics to clean out the rascals"—that is in quotes—"than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts."

Now, once the consent decree is entered, the judge has full power to use contempt to make the people that entered into the decree obey it. Now when it is the end of the term and you have got a new Governor coming or a new Mayor coming in, then the plaintiffs' lawyers have the ability to show the decree as still needed. And until the decree is modified, it is still enforceable.

Most of these decrees have built into them provisions that require the defendants to give the plaintiffs all kinds of information, basically an ongoing discovery. Plus, there is discovery. So the plaintiffs and often the plaintiffs' lawyers have better—and I could tell you, I was in this position myself as a plaintiff lawyer—have better information than does the Mayor as to what is going on.

So if there is a problem, the plaintiffs' lawyers ought to be able to show it. And when they can show it, the decree should stay in force, and it should be punishable through the power of contempt.

Mr. COHEN. Well, my red light has gone off, but I am going to take this opportunity just to ask you. You are an NRDC alum, aren't you?

Mr. SCHOENBROD. Yes, I am, sir.

Mr. COHEN. Are you a Keystone XL opponent?
Mr. SCHOENBROD. I think Keystone is a bad idea.
Mr. COHEN. Good.
Mr. SCHOENBROD. I am against the pipeline.
Mr. COHEN. Thank you, sir. Just checking.
Mr. COBLE. You worked that one in very cleverly, Mr. Tennessee. [Laughter.]
I would be remiss if I didn't recognize Ray Smietanka, who used to be a longtime staffer. Ray, good to see you again.
The distinguished gentleman from South Carolina, Mr. Gowdy, is recognized for 5 minutes.
Mr. GOWDY. Thank you, Mr. Chairman.
I want to thank you for your leadership on this Subcommittee, and I want to, given the hard work of my friend and colleague, the gentleman from Arizona, Mr. Quayle, I wanted to allow him to ask his questions first in light of the pending votes and because of his expertise in this area.
So I would give my time to my friend from Arizona.
Mr. COBLE. The gentleman from Arizona is recognized.
Mr. QUAYLE. Oh, I thank the gentleman from South Carolina, and thank you, Mr. Chairman, for holding this hearing, and for the witnesses for being here.
During your testimony, Mr. Cruden, it was interesting that you brought up the fact that some of these bills might have a negative effect on Native Americans. And it is precisely the negative effect that some of these consent decrees have on the Native American community in Arizona, which is one of the interests that I have been in trying to solve some of these issues.
More specifically, it was late last year that the EPA entered into a consent decree with the National Parks Conservation Association and eight other environmental organizations, and this consent decree would require the Navajo generating station to invest over $1.1 billion in emission control equipment or just shut down. This could cost hundreds of jobs for tribal members up in the northwest part of Arizona.
And if it does go through, this is going to actually end up costing all Arizonans about a 20 percent increase in energy. So that there—you were mentioning some of the negative consequences for Native Americans, but there is also negative consequences for these consent decrees that they are adamantly opposed to because they haven't been able to get the right to actually comment on it in the public sphere.
And so, if you could just address that really quickly?
Mr. CRUDEN. I will. Of course, Native Americans in some instances are bringing the cases, and in some cases, the case is being brought against them.
One misnomer about consent decrees, they don't go into court by themselves. They go in with a complaint. So there will be a complaint signed, in this case by a United States attorney probably, that lists all of the violations of law that exist. Then the complaint—then the consent decree resolves those violations by Department——
Mr. QUAYLE. But a lot of the consent decrees——

Mr. CRUDEN. Just one sentence. By Department of Justice policy——

Mr. QUAYLE. I have very limited time, sorry. But a lot of these times where they are—actually, the complaint is filed at the same time that the settlement is filed as well. So you don't even get that day in court. It is actually just, hey, we have put the complaint in, and we have the settlement. So whoop-de-doo, these are all done behind closed doors.

Mr. CRUDEN. In those cases, two things. In those cases, sometimes they are, and there might have been a year of negotiations. But in the instance that you are talking about, which would have been an enforcement action, by Department of Justice policy, the consent decree is public. There will also be public comment taken on it. The judge is only given the consent decree but not asked to make it final until after there is public comment on that enforcement action. That is being done right now at DOJ——

Mr. QUAYLE. Right. Except the problem is that it is very limited in the public comment. It is much more limited than the normal regulatory process, as Mr. Martella talked about with the off ramp.

But I want to get to Mr. Martella, especially since we both went to Vanderbilt Law School. So I really value your testimony here. But one of the things that—I want to get your take on this. One of the concerns that I have in some of these sue and settle agreements is that you have a certain private interest group that comes to Congress, lobbies for some statutory language to be put in. It is politically viable, but it sets a timeframe that is unrealistic in terms of being able to implement this.

And that is where the sue and settlement comes into fruition because they are able to get it through because they have lapsed in the timeline, and they can go in and get a more stricter rule applied via that process. Do you think that this abuse is happening right now, and does the Sunshine Act actually help address some of those issues?

Mr. MARTELLA. I think it is happening a lot. I actually think, as someone who has been in a number of Federal agencies, that the pressure of having the deadlines that Congress sets, with limited resources, then the added pressure of having to rejiggle those priorities and those resources based on these settlements adds an entire new level of complexity because you only have limited resources.

And if you have this deadline and all of a sudden, you have entered an agreement that says now the party has that deadline, first of all, the new deadline is probably unrealistic, as shown in a couple examples, but how are you going to meet the first deadline at the same time? So it really creates a total conundrum for these agencies with very limited resources and creates these outside influences on what the priorities really are.

Mr. QUAYLE. Thank you.

Mr. Grossman, I just wanted, along those same lines. You have—the Dodd-Frank bill was passed not too long ago. However, it is estimated that three-fourths of the rulemaking deadlines in Dodd-Frank have lapsed.

Do you have concerns that there will be a spike in the current Administration entering into these agreements this year because of

all the lapses within Dodd-Frank, and how will that have an effect on our financial system?

Mr. GROSSMAN. I am gravely concerned that we are going to see repeats of what we saw at the end of the Carter administration where the Administration entered into numerous consent decrees that for the next 8 years wound up tying the hands of the Reagan administration, which had a very different view and was, to some extent, unable to carry out its electoral mandate, was hobbled in that because of these consent decrees.

In this sense, they undermine representative democracy, and that is very serious.

Mr. QUAYLE. Thank you very much.

Thank you, Mr. Chairman and the gentleman from South Carolina.

I yield back.

Mr. COBLE. Thank you, Mr. Quayle.

The distinguished gentleman from Georgia, Mr. Johnson, is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

Indeed, for the Koch brothers, things go better with the Keystone pipeline. And—it is on. Things go better with the Keystone pipeline. And so, Professor Schoenbrod, I am amazed that you would come in and say that you were opposed to the Keystone pipeline, especially when the Koch brothers are so intimately associated with the organization that you work for, the American Enterprise Institute.

Mr. SCHOENBROD. Well, to answer your question——

Mr. JOHNSON. But let me move to Mr. Martella. Mr. Martella, you described yourself as an environmental lawyer, but in fact, it would be better to say that you are a corporate environmental lawyer. Is that true?

Mr. MARTELLA. My existing clients are corporations——

Mr. JOHNSON. Well, I mean, yes, you started out at the law firm where you are situated now representing corporate clients, and then you went into Government with the Bush administration, correct?

Mr. MARTELLA. Actually, if I could correct that? I wasn't. I was a career civil servant for, I think, 11½ of my 13 years of public service as general counsel and——

Mr. JOHNSON. With the Bush administration, right?

Mr. MARTELLA. At the end of my career, yes. I was hired by the Clinton administration, promoted by the Clinton administration——

Mr. JOHNSON. And of course, the Bush administration was not interested in any regulations whatsoever, and you were, when you say that you were an environmental lawyer, you were actually an anti-environmental lawyer, and you are still an anti-environmental lawyer, looking at your clients. And you represent a lot of corporate clients, both in litigation and strategy, advice, consultation, on how to get around the environmental regulations that Congress or that the EPA may enact through its rulemaking authority, pursuant to congressional legislation.

And so, we appreciate you being here, but who is your client today?

Mr. MARTELLA. Well, I think——

Mr. JOHNSON. Is it a business that you are representing, or is it a philosophy?

Mr. MARTELLA. I am here in my personal capacity. And I think I am really here——

Mr. JOHNSON. So you are not getting—you mean to tell us that you are here and you are not on the clock, making $600, $700 an hour?

Mr. MARTELLA. I am not on any clock. I am actually very much thinking of my three children, who are 12, 8, and 5, and who, in my role as an environmental lawyer, is to make sure that when they grow up, they have a stronger environment than we have today.

Mr. JOHNSON. Well, I know that they will have—they may even end up in the 15 percent tax bracket with the kind of moves that their daddy is making in the business world. And I appreciate that. I am a lawyer myself and represent various interests. So I am not speaking of you personally. I am just speaking of the interests that you represent.

But, Mr. Grossman, you——

Mr. MARTELLA. And I think your stereotype is unfortunate.

Mr. JOHNSON. Mr. Grossman, you are a graduate of George Mason University, correct?

Mr. GROSSMAN. Yes.

Mr. JOHNSON. The law school. George Mason University Law School, a public university in Virginia that has received more than $30 million from the Koch brothers. And you are also familiar with the Mercatus Center, which is——

Mr. GROSSMAN. I believe it is Mercatus.

Mr. JOHNSON. Mercatus? Yes, you are familiar with it. And its goal is to deal with how institutions affect the freedom to prosper. That is——

Mr. COBLE. Mr. Johnson, would you suspend just for a moment?

Mr. JOHNSON. I will, without waiving any time.

Mr. COBLE. Well, you seem to be going far afield here. If you could confine it to the issue at hand.

Mr. JOHNSON. Well, you know, it goes to the credibility of these three witnesses, all of whom have connections to the Koch brothers, and we have got—I mean, this is not the first hearing where this has happened, where we have had a full monty, if you will, of Koch brothers-influenced lobbyists. And I think you are a lobbyist, too, aren't you, Mr. Grossman?

Mr. GROSSMAN. No, I am not. And let me add——

Mr. JOHNSON. You are not a registered lobbyist?

Mr. GROSSMAN. No, I am not. I have not engaged in any lobbying activity ever, so far as I am aware.

Mr. JOHNSON. But the Mercatus Institute, you are a product of that?

Mr. GROSSMAN. I have never even set foot in the Mercatus Institute. You are alleging that my connection with the Koch brothers is that I attended a law school——

Mr. JOHNSON. Don't the Koch brothers donate money to George Mason University?

Mr. GROSSMAN. Pardon?

Mr. JOHNSON. Koch brothers donate money to George Mason University?

Mr. GROSSMAN. Who donated money to your university? Beats me.

Mr. JOHNSON. Do they maintain editorial control over what comes out of that university's think tanks?

Mr. GROSSMAN. I don't even know what that would mean in a university setting, and I was a student at the university, rather than an employee or a lobbyist or of its think tanks.

Mr. JOHNSON. Well, you grew up in that environment, and you are a reflection of that environment in your professional role here today. And that is the point that I want to make.

Thank you.

I will yield back.

Mr. COBLE. Mr. Martella, I may be wrong. I may be inaccurate in this, but you worked with the Clinton and the Bush administration, did you not?

Mr. MARTELLA. Thank you, Mr. Chairman.

Yes, I was hired by the Clinton administration. I was actually promoted by the Clinton administration. And as I mentioned, I was very proud to be a career civil servant for virtually the entirety of my career, and I was unanimously confirmed by the United States Senate, with the support of Barbara Boxer and Senator Obama at the time.

Mr. COBLE. Well, thank you, sir.

Mr. CRUDEN. Congressman, I would ask a point of personal privilege.

Mr. COBLE. Yes, sir.

Mr. CRUDEN. Mr. Martella and I may not agree on the impact of H.R. 3862, but I have known this gentleman for 15 years. He is a man of great integrity and is a great environmental person.

Mr. COBLE. Well, and I stand by my opening statement when I said we were blessed with an outstanding panel, and I included all four of you.

Now let me shift my weight to my right. Mr. Quayle, I think procedurally, you are up next even though the gentleman from South Carolina yielded to you earlier. Mr. Ross, is that——

Mr. QUAYLE. Since the gentleman from South Carolina yielded to me, I will yield to the gentleman from South Carolina.

Mr. COBLE. And if the gentleman will suspend? Folks, it looks like we may be paying the preacher in this case because I think we are going to beat that floor vote. So if you all will proceed, Trey, you are recognized for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

I thank the gentleman from Arizona.

I am actually not going to ask the questions that I had drafted to ask. I will submit those in writing.

Instead, I am going to do something which often isn't done in congressional Subcommittees, which is ask a question and then not interrupt the person while they are trying to answer it. So, Mr. Martella, take a minute and say whatever you would like to say, given the fact that your credibility was unsuccessfully impeached.

And then, after that, Mr. Grossman, you take a minute and you say whatever you want, given the fact that your credibility was unsuccessfully impeached.

Mr. MARTELLA. Well, thank you, Congressman. And I appreciate the opportunity.

I think the one reaction I would have is I think stereotypes are always unfortunate, and it seems like there was a suggestion of a stereotype that because I work for a law firm today and because I represent corporations that, therefore, necessarily I don't care about the environment.

And I think nothing could be farther from the truth. I have always seen myself as an environmentalist. Of my 15-year career, 12 were spent as Government civil servant doing that. And today in my job what I am very proud of, despite the stereotypes, is I don't just represent corporations in a way to skirt the law. What I do is I work with corporations to find ways to comply with the laws and help ensure that we have solutions that incorporate a wide range of stakeholders, including environmental groups, including the Government.

I would estimate in half of the cases I have in court, I am actually defending the EPA on behalf of corporations. It is the environmental groups who might be challenging something at the EPA, and we are actually defending the Obama administration EPA. And I am proud of the fact that in half of the cases, we are on that side.

I mentioned as the father of three children, my overriding concern in my day-to-day job is that we have a better environment for them than we do for ourselves today. And I think anyone who is a father or mother here would agree with that.

So, again, if I could help perhaps address those stereotypes today or at some other point in the future, I would be happy to do so, but thank you for giving me that opportunity.

Mr. GOWDY. Thank you, and thank you for being here.

All the witnesses, whether I agree with them or not, are doing us a courtesy and a favor by loaning us their expertise.

And Mr. Grossman, Professor, in fairness to you, you wanted to answer a question. Given the fact you don't support Keystone, I am going to give the remainder of my time to a guy I know that does, Mr. Quayle. [Laughter.]

So after you go, Mr. Grossman, I am going to give the time back to my friend from Arizona.

Mr. GROSSMAN. Thank you.

Mr. COBLE. Mr. Grossman, if you would suspend just a minute?

I want to commend the gentleman from South Carolina and the gentleman from Tennessee for very cleverly having inserted this issue into the dialogue.

And Mr. Cruden, thank you for your comment as well earlier.

Mr. Grossman?

Mr. GROSSMAN. I don't feel the need to respond directly to baseless ad hominem attacks. I think my work speaks for itself, but thank you.

Mr. GOWDY. Very well. I would give the remainder of my time to the gentleman from Arizona, Mr. Quayle.

Mr. QUAYLE. Thank you very much.

And I want to echo what the gentleman from South Carolina said, that we have an excellent panel. We might not agree on everything, especially the Keystone pipeline, but they do provide their expertise and their knowledge to all of us so that we can make more informed decisions on the type of legislation that we need to move forward.

So now that we have gotten past one of the favorite bogeymen of the Koch brothers and we can get back to the issue of these two pieces of legislation, it would be great to talk about, Mr. Grossman, you mentioned the Meese memo.

And there was a lot of talk in the written testimony about the Meese memo. Do you have any concerns with the Meese memo, or do you think that anything within the Meese memo that was not put in or the ideas that in H.R. 3862 could be incorporated to make it a stronger and better bill?

Mr. GROSSMAN. Thank you.

I think the Meese memorandum was really a path-breaking way of looking at this problem. It identified a problem that certainly the legal academy and a lot of practitioners did not realize before, and it really is the definitive statement in this area.

I think the bill appropriately incorporates the provisions of the Meese memorandum in that it would be inappropriate from potentially a constitutional point of view, but probably from a policy point of view for Congress to limit in the way the Meese memorandum does the executive branch's settlement authority.

But I think that the legislation takes a much more thoughtful approach by using the Meese memorandum as a basis to judge which types of settlement agreements and consent decrees raise special concerns that require high-level authority and high-level discretion to execute. I think that is exactly the right approach, and I commend the authors of the bill for taking it. It is the right way to do it.

Mr. QUAYLE. Okay. Thank you.

And Mr. Martella, I am a new father as well, and I want the environment to be better than it is now. And I think that you might agree that environmental stewardship and economic growth are not mutually exclusive.

And one thing I want to know about the sue and settlement agreements, have they been happening more or less on major rulings rather than minor ones? I just want to get your sense as where they actually are occurring.

Mr. MARTELLA. I think it is across the board. I think they are more publicized when it is on major rulemakings, and the impacts are more significant. But I think we are seeing in a wide range of settlements.

And again, my point here today is not to suggest the Government shouldn't settle these cases. I strongly advocate settlement over litigation in virtually every instance.

To me, what is important is getting all the stakeholders around the table. It is transparency, public participation, judicial review. These are the bedrock principles of our democratic system, and I am only here to say that we should be enforcing these principles and guaranteeing protection for them.

Mr. QUAYLE. Great. Thank you very much.

I yield back.

Mr. COBLE. Thank you, Mr. Quayle.

And finally, the distinguished gentleman from Florida, Mr. Ross, is recognized.

Mr. ROSS. Thank you, Mr. Chairman.

Mr. COBLE. You have been very patient, Mr. Ross.

Mr. ROSS. Oh, I have been enjoying this. Unfortunately, it hasn't been a very nice process to my State, the great State of Florida.

You know, and it is what these consent decrees, what I call "regulation by litigation." It seems to me that it would be almost easier to have regulatory agencies encourage the sue and settle so that they could circumvent the regulatory hearing process to enter into consent decrees with third parties that don't involve the actual affected parties.

And Mr. Cruden, I appreciate your analysis and, in fact, believe that, empirically speaking, consent decrees work the way you have testified. However, from a personal perspective and from a practical perspective, dealing in my State specifically with numeric nutrient water criteria, that has not been the case.

In fact, you may be familiar with this particular issue because, pursuant to the 2003 Clean Water Act, my Department of Environmental Protection in the State of Florida began doing their own numeric—well, quantitative water analysis. We are surrounded by water on all three sides. We have got a lot of inland water, and we know that clean water is important not only to our health and livelihoods, but also to our business and to the commerce of our State.

So DEP is going about trying to provide their own water standards, and all of a sudden, Earthjustice comes along, files suit against the EPA, and says, "Look, they are not going fast enough. We want this taken care of."

And then what happens? Well, absent the State of Florida being involved in a consent decree negotiation, absent the interveners being involved in the consent decree negotiation, suddenly, a consent decree is issued that impacts my State economically that will cost over 14,000 jobs, that its capital costs on municipal wastewater plants will exceed $21 billion.

Estimated costs of anywhere between $3.1 billion to $8.4 billion over the next 30 years to comply. And what we have seen, Mr. Cruden, is not that we are telling Mayors that we don't trust them, but what we are telling my State Department of Environmental Protection is that we don't trust them.

And it seems to me that we have circumvented, as Mr. Grossman indicated, the public notice and comment process. What would be wrong, what would be wrong for requiring not only transparency, but also that all parties come to the table and be engaged in the consent decree process?

Mr. CRUDEN. One of the things, and I think, by the way, I am not involved in that case. But I certainly was involved in the Florida Everglades consent decree——

Mr. ROSS. Yes, sir.

Mr. CRUDEN. And that has another history of going through modifications, attempted modifications. But we probably would not be where we are today with that great natural resource, which I

am sure you would agree, without what was done by the State in that decree.

But I think one of the things we are losing sight of is that these consent decrees, whether or not they are for rulemaking, for anything else, are because there is somewhere a mandatory duty and a violation of the law. I have seen countless cases, countless cases, where I was on the receiving end, where some group—by the way, could be a corporation—saying an agency was supposed to have a rule and they haven't done so for 10 years.

Mr. ROSS. But we were in the process. We were in the process.

Mr. CRUDEN. But my point is they are already violating the law, and so the consent decree in those cases sometimes is only——

Mr. ROSS. Violating according to who? I mean, the unique perspective of the State of Florida is that we are the only peninsular State, that we have natural water resources that are more abundant and more precious than most other States, with all due respect.

But our livelihood depends on it. Who would know better than us, whose livelihoods depend on these natural resources, than how to maintain them and keep them clean? And here we are, being expedited in a process by a third party without the transparency.

Mr. CRUDEN. I can't speak at all because I just simply don't know the individual case that you are mentioning. I don't doubt that it is important. Most of these consent decrees, however, that go to rulemaking, which is what we are talking about with this legislation, the rulemaking itself has notice and comment, has an opportunity to be heard. And if people are not happy with the end result, there is an opportunity to fully challenge it in court.

Mr. ROSS. Well, if they challenge——

Mr. CRUDEN. That exists also under the Administrative Procedure Act.

Mr. ROSS. And you also indicate that you can modify it, but you have to show a significant change in circumstances that warrants the revision. Absent having all the parties at the table at the time the consent decree is issued, seems to me that meeting the burden of a significant change in circumstances is going to be much harder and not equitable.

But let me move on real quickly. I want to go to an issue of standing. One of the issues that I think is very important is if we are going to have third parties enter into these settle and sue procedures, should we not address the issue of standing? Should they not have some sense of standing that they are affected by the actual regulatory rule that is being promulgated?

And Mr. Martella, I will start with you. I know I am out of time, though.

Mr. MARTELLA. Well, I think standing is a critical issue on both sides, and I think one of the concerns—if I could perhaps even rephrase the concern from my perspective, is the lack of a level playing field. Even if the environmental groups do have standing, there are other affected parties who have standing, too. If it is a rulemaking, there may be trade associations or other groups that are affected by it, but they don't have the same standing at the table with the Government when it comes to these negotiations.

I would argue that if you are going to look at the standing of one party, because they are impacted by something, you have to look at the standing of all the parties who are impacted, bring them to the table. And frankly, that is exactly what the Sunshine Act does.

Mr. ROSS. Thank you.

I see I am out of time. Mr. Chairman, thank you.

Mr. COBLE. Thank you, Mr. Ross.

Gentlemen, this is the first step of subsequent steps to follow, an important hearing, and I thank the Members of the Subcommittee for their attendance.

I thank each of the four witnesses for your contribution through your testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record.

Without objection, all Members will have 5 legislative days to submit additional material for inclusion in the record.

With that, again thank the witnesses, and this hearing stands adjourned.

[Whereupon, at 10:43 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Courts, Commercial and Administrative Law

The debates that this Subcommittee has engaged in during this Congress often veer into abstractions.

But what can get lost in the back-and-forth about the proper scope of Federal power, states rights, separation of powers, checks and balances, judicial activism, and political accountability is the fact that how we come out on these important questions can have a tremendous impact on ordinary people's lives, for good or ill.

I hope that we keep this reality the central focus as we consider H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine in Regulatory Decrees and Settlements Act of 2012."

Consent decrees are an important means by which plaintiffs can seek to remedy violations of Federal rights by state and local governments. They can also be used to ensure that Federal agencies are meeting the mandates set for them by Congress.

Consent decrees, therefore, are commonly used to resolve a wide variety of cases involving civil rights, voting rights, disability rights, and environmental protection, among other things.

Consent decrees can benefit both plaintiffs and defendants by allowing for timely resolution of disputes without the risks and costs associated with prolonged litigation.

Defendants can also avoid determinations of liability and the risk that a costly or cumbersome solution simply will be imposed on them should they lose the suit.

Moreover, the use of consent decrees in Federal court litigation is in keeping with the broader judicial and Congressional policy of encouraging settlement.

I have no doubt that, as with anything else, not all consent decrees are perfect. If I think long enough about it, I might even think of a few that would give me pause as to their continued usefulness or necessity.

I also have no doubt that the proponents of these bills, including Rep. Jim Cooper, my esteemed fellow Tennessee Democrat and sponsor of H.R. 3041, are sincere in their belief that these bills will achieve a better balance in the way consent decrees are used.

Still, I have concerns about both bills that I would like the proponents of these bills to address.

To begin with, H.R. 3041 would seem to have the effect of discouraging consent decrees against state and local governments and officials.

The bill would allow state and local government defendants to seek modification or termination of a consent decree after four years from the entry of the decree or the term of office of the highest official who is a party to the decree ends, whichever is earliest.

Additionally, the bill places the burden of proof on plaintiffs to prove the continuing need for the consent decree.

In light of these provisions, I cannot think of why a plaintiff would ever agree to settle a case. It would seem to me that, rather than facing the prospect of having to re-argue in favor of a consent decree every few years, a plaintiff would simply press on with litigation.

Also, to the extent that a consent decree is overly burdensome or has outlasted changed circumstances, it is not clear to me why modification of the decree pursuant to Federal Rule of Civil Procedure 60 is not a sufficient remedy.

Moreover, the Supreme Court in *Frew v. Hawkins* set out what appears to be a fairly liberal standard for granting modification or termination requests by state and local government defendants. Also, the Court seemed to go to great lengths to

emphasize that Federal courts must respect state and local prerogatives and principles of federalism when considering whether to modify or terminate a decree.

H.R. 3862, meanwhile, seems like it is designed to impede Federal rulemaking and other regulatory action, much like the regulatory legislation we considered last year.

This bill would apply to consent decrees and settlement agreements that require Federal agency action that affects the rights of private third parties.

For such consent decrees and settlement agreements, the bill imposes a number of procedural requirements on both agencies and courts. These include requiring agencies to solicit and respond to public comments on such proposed decrees and agreements and providing opportunities for third parties to intervene in the underlying action and the consent decree process.

These provisions and others in the bill would seem to needlessly slow down agency action and open the door wide open to almost anyone who wants to impede agency action, including the promulgation of important public health and safety rules.

I would also like to know from John Cruden, one of our witnesses today, whether, based on his 20 years of experience negotiating consent decrees as a career Justice Department official representing the government as both plaintiff and defendant, he believes that H.R. 3862 addresses a real problem.

I thank the witnesses for their participation in today's hearing and look forward to their testimony.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The two bills before us today—H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine in Regulatory Decrees and Settlements Act of 2012"—appear intended to make it easier to modify or terminate consent decrees, to make it more difficult to enter into them, and to generally discourage their use.

These bills threaten to undermine a key tool in guaranteeing the rights and protections that Congress has enacted over the last two generations.

These include Federal civil rights and environmental laws that are designed to protect ordinary people who are victims of racial discrimination, voter intimidation, police brutality, or toxic pollution.

A consent decree is a voluntary settlement agreement between plaintiffs and defendants that is entered by a court and is enforceable as a court order. Consent decrees are often used to settle public law and institutional reform litigation.

By reducing costly and time-consuming litigation, consent decrees and settlement agreements benefit both plaintiffs and defendants.

They help to ensure that Federal protections are enforced while leaving flexibility for governmental defendants as to how they will carry out their Federal obligations.

Given these benefits, I am troubled by the effect that these bills may have on consent decrees and settlement agreements.

First, H.R. 3041 will virtually eliminate all consent decrees against state and local governments by imposing an effectively unworkable time limit on their duration.

Under this bill, a defendant may file a motion with a court to modify or terminate a consent decree at the earliest of either 4 years after the decree is entered or when the term of office of the highest ranking official who is a party to the decree ends, which could be less than 4 years.

Moreover, the bill places the burden on the plaintiff to prove that there is a continuing need to have the consent decree in force without modification or termination.

Taken together, these provisions would force a plaintiff to re-litigate its case against a state or local defendant every few years.

Given that prospect, no plaintiff would ever agree to enter into a consent decree with a state or local government defendant. Rather, plaintiffs would simply continue to press on with litigation, adding great expense to American taxpayers and uncertainty for all parties involved.

Also, many consent decrees are designed to reform institutions like prisons, police departments, child welfare agencies, and education systems. Revisiting consent decrees well before they have a chance to fully be implemented would simply short-circuit institutional reform efforts.

And, it could encourage state and local governments to drag their feet in complying with such decrees in order to effectively "run out the clock."

Second, H.R. 3862 is yet another attempt to prevent Federal regulatory actions from being implemented.

When a Federal agency defendant is sued because of a failure to take regulatory action, it is often because the agency has missed statutory deadlines for taking such action, often by years.

Consent decrees and settlement agreements can help assure that the agency takes such action by a date certain.

H.R. 3862, however, would needlessly slow down the process by which such consent decrees are entered.

This bill imposes an extensive series of burdensome requirements on agencies that seek to enter into consent decrees or settlement agreements.

For example, it mandates that agencies provide for public comment on a proposed consent decree and requires agencies to respond to all such comments before the consent decree can be entered in court.

In the case of consent decrees concerning rulemaking, an agency would be forced to go through two public comment periods, one for the consent decree and one for the rulemaking that results from the consent decree, doubling the agency's effort.

Moreover, the bill would allow an unlimited number of third parties to intervene in the consent decree process, further delaying the entry of a consent decree.

Like the anti-regulatory bills we considered last year, this bill piles on procedural requirements for agencies and courts.

Also, like last year's anti-regulatory bills, this bill threatens to open the door to dilatory litigation tactics by interests that are hostile towards regulatory protections.

Third, neither bill is necessary. They clearly are solutions in search of a problem.

For instance, Federal Rule of Civil Procedure 60 already allows state and local government defendants to seek court authorization to modify or terminate a consent decree.

Rule 60 requires a court to revisit its decrees when changed circumstances would merit modifying or terminating the decree.

Moreover, as the Supreme Court made clear in *Frew v. Hawkins*, Federal courts must be deferential to state and local government prerogatives when considering whether a consent decree should be modified.

Viewed together, it is clear that the standard for modifying or terminating consent decrees against state and local governments is a fairly liberal one.

Accordingly, the burden on state and local governments seeking modification or termination does not warrant a legislative response.

With respect to H.R. 3862, it is not clear what, exactly, is the problem that it is trying to address. My understanding is that most lawsuits and consent decrees against Federal agencies that seek some sort of regulatory action simply seek to ensure that the agency meets its existing statutory obligations. How that raises transparency concerns is beyond me.

H.R. 3862 also codifies certain guidelines, first issued by Attorney General Edwin Meese nearly 30 years ago, for government attorneys to follow when determining whether or not to enter into consent decrees and settlement agreements.

For example, government attorneys may not enter into consent decrees that would make mandatory an agency's discretionary authority to promulgate or amend a rule, nor may they agree to an obligation to seek funding from Congress to implement a consent decree.

These guidelines have been incorporated into the Code of Federal Regulations since Attorney General Meese issued them.

So I must ask: why do we need to codify them? Is there any evidence that these guidelines are not already being followed?

Consent decrees are a vital instrument for enforcing Federal rights and protections. I fear that the bills before us today will discourage their use and, therefore, undermine the effective protection of Federal rights.

Response to Post-Hearings Questions from Roger R. Martella, Jr., Sidley Austin LLP

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March 16, 2012

Honorable Howard Coble
Chairman, Subcommittee on Courts,
Commercial and Administrative Law
2188 Rayburn House Office Building
Washington, DC 20515-3306

Re: Re: Response to Questions for the Record, "Hearing on H.R. 3041, the 'Federal Consent Decree Fairness Act,' and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlement Agreements Act of 2012'"

Dear Chairman Coble:

Thank you again for the honor to appear before your subcommittee to provide my views regarding the Sunshine for Regulatory Decrees and Settlement Act and the Federal Consent Decree Fairness Act. As I testified, I believe these Bills provide opportunities to increase fairness, transparency, and public participation in administrative rulemakings while providing a mechanism for the Executive Branch to ensure sound and principled environmental decision making in this very litigious environment we all inhabit. I commend the Subcommittee for addressing this issue at a critical time, and look forward to assisting your ongoing efforts.

My responses to your questions for the record are below.

1. In some cases, settlement agreements in lawsuits over agency regulatory duties go so far as to prescribe the actual text of regulations that agencies must propose.

   a. Do consent decrees also sometimes prescribe the text of proposed regulations?

   b. If so, what concerns should Congress have about that?

   c. If not, can consent decrees still be structured in ways that essentially foreordain what regulations agencies will propose? For example, can the deadlines for proposed regulations prescribed by consent decrees be so strict that the only way agencies can meet them is to propose regulatory text agreed upon with plaintiffs before the consent decrees are entered?

It is not uncommon for both settlement agreements and consent decrees to specifically identify key elements of a subsequent proposed rulemaking and thereby limit an Agency's discretion and flexibility regarding the scope of a proposed—and ultimately, final—rule. For example, in the greenhouse gas New Source Performance Standards consent decrees referenced in my testimony, EPA committed to include several specific substantive parameters in the proposal, including a proposal to address emissions from both new *and* existing sources. The commitment to propose first ever greenhouse gas standards for existing facilities was a significant development beyond the anticipated course of action that EPA would only pursue such standards at this time for new facilities.

Importantly, defining the scope of a proposed rule in a settlement agreement has significant influence on the agency's ultimate discretion in the final rule. As you are aware, courts require that a final rule be the "logical outgrowth" of the proposed rule. In other words, a proposed rule has significant bearing on the content of the final rule as an Agency is usually required to explain and document any significant departures from a proposed rule or, in some instances, engage in a further notice and comment opportunity when the final rule is not a logical outgrowth of the proposal. Thus, making commitments to formulate a proposal in a specific manner in a settlement agreement carries through the final rule in a substantive way, even though settlement agreements rarely mention the scope of the final rule explicitly.

As I discussed in my testimony, I strongly support and encourage efforts to pursue settlement agreements and consent decrees whenever feasible. And I do not intend my comments to suggest it is always inappropriate for a settlement agreement to provide some definition and scope to the subsequent proposed rule; I recognize that frequently such terms are critical to reaching an agreement outside of litigation. However, my overarching recommendation to the Subcommittee is to address and improve the *process* by which these agreements are reached in the first instance. By promoting fairness, transparency, and public participation of interested stakeholders in the first instance, settlement agreements will better reflect a wide range of interests that must be balanced, result in stronger and more defensible outcomes, and improve the success of the subsequent rulemaking process. The proposed Sunshine Act significantly furthers these goals of improving the process by which settlement agreements and, in turn, subsequent rulemakings, are developed.

> 2. Is there a danger that settlement agreements or consent decrees in lawsuits over agency regulatory duties could be used by one administration to try and prescribe the content of regulations the next administration will have to propose or otherwise unduly bind a succeeding administration?

Yes. A typical rulemaking takes no less than a year to complete from developing a proposed rule to promulgating the final rule in the Federal Register and many if not most rulemakings take significantly longer. Even after the final rule is promulgated, litigation related to the rule can take additional years. Thus any settlement that provides for a rulemaking to begin in the third or fourth year of an Administration is likely to have ramifications in the next Administration.

Further, as discussed above, the content and scope of the proposal itself significantly influences the ultimate content of the final rule and limits the discretion of an agency in the final rule itself by framing the issues that necessarily are a "logical outgrowth" in the final rule. Thus, even the publication of a proposed rule has the opportunity significantly bind a future Administration charged with finalizing the rule by a deadline agreed to in a settlement agreement by the prior Administration.

> 3. One witness at the hearing suggested that H.R. 3862, by increasing procedures to be completed before consent decrees can be entered, would unduly discourage the use of consent decrees and encourage plaintiffs and defendants instead simply to litigate to final judgment in the relevant lawsuits. Do you share that concern, or do you believe the concern is unfounded?

I share the goal of encouraging settlements of lawsuits in the broadest possible settings and would not recommend actions that would create a perverse incentive to litigate over settling a claim. At the same time, I do not share the concern expressed in question 3. In my view, H.R. 3862 does not disincentive opportunities for settlements, but merely promotes fundamental good government concepts of fairness, transparency and public participation by impacted stakeholders. All government agencies and parties, regardless of their litigating position or affiliation, should embrace such concepts. To the contrary, as I indicated in my testimony, it has been soundly my experience that when settlements reflect the perspectives of the broadest group of stakeholders they are more likely to be efficiently implemented as opposed to merely delaying more litigation to a later date and further round by the parties who did not participate in the original settlement.

> 4. It also was suggested at the hearing that, in cases involving consent decrees and settlement agreements over agency rulemaking duties, affected parties, even if excluded from the litigation and negotiations that produced the decree or agreement, still have opportunities to participate in the notice and comment proceedings that eventually will produce the rules, and then can challenge the final rules in court to challenge the rulemakings themselves.
>
> > a. Even if that is the case, can the applicable procedures and standards of review in those later administrative and judicial contexts make it difficult for the affected entities to have an adequate or fair chance to help shape final regulations, as compared to those who participated in the litigation that produced the consent decree or settlement agreement?
> >
> > b. If so, do the provisions of H.R. 3862 help to restore fairness and balance to the rulemaking process?

First, the premise is technically true: a party that does not participate in settlement negotiations should have the opportunity to provide comments during a notice and comment process on the subsequent proposed rule and to also challenge that subsequent final rule in court. However, merely deferring litigation to a future stage after the government goes through a costly and complex rulemaking process is hardly an efficient or rational path forward by any account. It would be vastly more efficient if such stakeholders could be heard during the settlement discussions themselves, thus potentially avoiding the need for further litigation once the rule is

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finalized. A settlement agreement that only guarantees further litigation but by different parties is hardly a rational path forward by any reasonable account.

Second, although providing comment and initiating subsequent litigation are technically options for parties adversely impacted and shut out of a settlement process, they typically are not meaningful options. As discussed above, the scope of the proposed rule strongly influences the scope of the final rule, and thus a settlement agreement can effectively preordain a final outcome even if it's not explicitly stated that way. Furthermore, final rulemakings typically receive a deferential standard of review by the courts. This means that a party aggrieved by a settlement may technically have a cause of action but limited bases upon which to challenge the final outcome. Finally, forcing both the government, the court, and the parties to relitigate the same issue is a further waste of resources and frustrates the efficiencies realized through settlement in the first instance.

H.R. 3862 would provide significant steps in the right direction to address these concerns. The measure would preserve the ability of the government to seek efficient settlement agreements while assuring along the way that information is shared, the public has an ability to participate and be heard, and that that the views of parties that could be adversely affected are considered by the Agency and the Court. Although some may find it inefficient to bring presumably adverse parties together in a mediation program, in my experience the opposite is true. The opportunity and ability to reach compromise prior to an agreement with all interested stakeholder input only increases the likelihood of an agreement that is long lasting, effective at realizing its intended goals, and responsive to a wide range of issues and solutions.

I hope these questions are helpful in your efforts to continue to promote fairness, transparency, and public participation in settlements and consent decrees. I would be honored to offer any additional assistance to you and the Subcommittee.

Sincerely,

Roger R. Martella, Jr.

Response to Post-Hearings Questions from John C. Cruden, President, Environmental Law Institute

Subcommittee on Courts, Commercial and Administrative Law
"Hearing on H.R. 3041, the 'Federal Consent Decree Fairness Act,' and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlement Agreements Act of 2012'"
February 3, 2012

Questions for the Record

Questions from Subcommittee Ranking Member Steve Cohen for John C. Cruden, Environmental Law Institute

1. Some of your fellow witnesses testified that the EPA has figured out a way to avoid the federal rulemaking process when it wants to implement a new rule that may be politically sensitive. They claim that all the agency has to do is have an environmental group sue over some aspect of the desired rule and then the EPA can agree to a consent decree or other settlement in lieu of litigation so that it could claim that it was "forced" by the court system and consent decrees to initiate the new rulemaking. As a result, this purported practice avoids public comment periods and political accusations over whether EPA is moving unilaterally.

   What is your response to these assertions?

   I firmly disagree. In my long experience with the types of cases covered by H.R. 3862, EPA only agreed to settle when the agency had a mandatory duty to take an action, or to prepare a rule, based on specific legislation enacted by Congress. The settlement in those cases was straightforward: setting a date by which the agency would propose a draft rule and, quite often, a date for final action. Had there not been such a settlement, a federal court would have issued an injunction setting the date for EPA to take action, since the agency's legal responsibility was quite clear.

   Because a proposed rule emerging from a settlement would provide the same notice-and-comment opportunities as any other rulemaking, and because the final rule still would be subject to challenge under the Administrative Procedure Act, this existing process obviously does not avoid public comment, and already allows interested parties their full range of substantive and procedural rights.

2. Based on your personal experience, are you aware of any "sue and settle"-type collusive settlements that the Justice Department sanctioned during your more than 20 years with that Department?

   I am not aware of any instance of a settlement, and certainly none I personally approved, that could remotely be described as "collusive." Quite the opposite: in every case of which I am aware, the Department of Justice vigorously represented the federal agency,

defending the agency's legal position and obtaining in any settlement the best possible terms that were consistent with the controlling law.

3. Under H.R. 3862, any private third party could weigh in on a proposed consent decree or settlement agreement pertaining to a regulatory action that affects the rights of private parties.

What is the scope of entities could intervene under this provision?

Under current Federal Rule of Civil Procedure 24, an outside party moving to intervene in a case as a matter of right must demonstrate, among other things, that the existing parties to the case do not "adequately represent" the movant's interest. Section 2(b)(3) of H.R. 3862 would in effect amend the Federal Rules of Civil Procedure as to this requirement by shifting the burden to the non-movants, as follows: "[i]n considering a motion to intervene by any party that would be affected by the agency action in dispute, the court shall presume, subject to rebuttal, that the interests of that party would not be represented adequately by the current parties to the action."

As a result, H.R. 3862 would make it significantly easier for any outside party to intervene. There appears to be no limitation on the scope of the entities that could seek to intervene under the provision—aside from the bill's requirement that the entity's rights be affected by the disputed agency action, and aside from the other existing requirements of Rule 24.

As I stated in my testimony, Congress has established robust procedures for amending the Federal Rules of Civil Procedure that have served for almost eighty years. The process includes the participation of court experts, the public, and two co-equal branches of government. Any member of the public may submit a proposed rule change to the Civil Rules Advisory Committee for its consideration. If the Advisory Committee approves of the suggestion, it will prepare a draft rule amendment. Following a public comment period, the Advisory Committee, Standing Committee, Judicial Conference of the United States, U.S. Supreme Court, and Congress must each approve the proposed amendment before it can take effect. This deliberative, collaborative process for amending the Federal Rules gives due regard both to the complex nature of procedural rules and to the great impact they can have on the administration of justice and the proper functioning of the courts.

4. Hypothetically, under H.R. 3862, suppose the regulatory action at issue involved the Clean Air Act. Would a person who breathes air have the right to intervene in a consent decree or settlement agreement? What about any affected industry entity? Could the intervention right provided for in H.R. 3862 be available to anyone in the United States?

Under H.R. 3862, a person who breathes air—as well as an affected industry—would presumably come within the class of "private parties" whose rights are affected by the Clean Air Act regulatory action at issue. If either were to seek formal intervention under the bill, and as I noted above in response to Question 3, Section 2(b)(3) of H.R. 3862

would lower the bar for intervention by requiring the court to presume that these outside parties' interests are not adequately represented by the existing parties. But I do not read the bill to afford every outside party an unconditional right to intervene: the existing parties would still have an opportunity to rebut the presumption that they do not adequately represent the moving party's interests, and any party seeking to intervene presumably would still have to satisfy other factors, including those spelled out in existing Rule 24 and relevant case law. A court could, of course, take a different reading and choose to interpret H.R. 3862 so as to more broadly supplant the requirements of Rule 24 intervention.

H.R. 3862 clearly would make it easier for parties to intervene in the litigation, as well as completely shift an important factor in a court's current Rule 24(a)(2) analysis. In my experience, the existing system works well and allows ample opportunity for intervention in appropriate cases. Tinkering with the established provisions could have unintended consequences both for the outcome of cases and for judicial economy. And as I previously mentioned, there is an established process for amending the Federal Rules of Civil Procedure that is thoughtful and non-partisan. That process should not be circumvented here.

5. In your prepared testimony, you note that you have personally negotiated or approved hundreds of consent decrees. You clearly have extensive experience working with consent decrees in a practical way during your many years at the Justice Department.

> Please explain how consent decree practices have resulted in beneficial settlements for all parties and produced good environmental outcomes. Where possible, please provide some real-world examples.

The judicially approved consent decree is a valuable settlement tool that promotes expeditious resolution of cases, saves transaction costs for all parties and for the judicial system, and achieves finality while protecting the parties to the agreement. Consent decrees are particularly important for making environmental laws work. They are used to successfully resolve both environmental enforcement actions brought by the government and lawsuits brought by local groups or individuals to ensure compliance with the law or to deter illegal conduct.

As compared to full-blown litigation, consent decrees allow for a faster and less expensive, but still comprehensive resolution of a dispute. Congress' underlying statutory objectives are satisfied, while at the same time, the state or local government is able to exercise its sovereignty through the negotiation of binding contracts and the resolution of potentially onerous pending litigation. Indeed, the finality and certainty afforded by the consent decree makes it far easier for a municipality to follow through on its commitments and obtain financing for the large engineering projects that are at times required to bring the municipality into compliance with the law.

In just the past several years, we have seen the successful use of consent decrees (including amended consent decrees) in major sewer infrastructure cases across the

United States, from Kansas City to Indianapolis to Honolulu. I highlight these and other current examples in the "Illustrative List of Recent Consent Decrees" appended to my Written Statement.

6. With respect to H.R. 3041, are you concerned in any way that current law governing consent decrees intrudes too much on the role of elected state or local officials? Do consent decrees last too long or otherwise present of risk of federal judges micromanaging state and local affairs?

To the contrary, in the cases with which I am familiar, state and local officials have embraced the consent decree process as a more flexible, negotiated alternative to litigation for meeting their obligations under federal law. As I testified, the multi-year duration of many consent decrees both matches the scope of ongoing problems like wastewater treatment, and serves as a guarantor of the state or local government's legal and financial commitments. Indeed, having a federal judge supervise the parties' agreed-upon terms is generally more favorable for the municipality than facing the inflexible rigors of a court-ordered injunction. And as I also testified, municipalities often obtain voluntary amendments to their consent decrees based on unforeseen circumstances, and in any case retain their right to petition the court to alter those terms if they meet the requirements of the Federal Rules of Civil Procedure.

7. Please respond to the concern expressed by Professor Schoenbrod that Federal Rule of Civil Procedure 60 may not be sufficient to safeguard the prerogatives of state or local officials seeking to modify or terminate a consent decree.

I respectfully disagree. My own view is that of the Supreme Court, which held unanimously in *Frew v. Hawkins,* 540 U.S. 431 (2004), that Rule 60(b)(5)'s established path for modifying consent decrees does not offend state sovereignty. While the justices acknowledged that federal courts should "'give significant weight'" to the views of state and local officials who are operating under a consent decree, they continued to place the burden on the party that is moving to modify the decree. The Court restated that rule as recently as 2009 in *Horne v. Flores*, where it again endorsed the "flexible approach" of Rule 60(b)(5) as the appropriate vehicle for addressing Professor Schoenbrod's concerns.

Insofar as these concerns are relevant to environmental matters, my testimony provides numerous examples where government and citizen enforcement of environmental laws has produced effective consent decrees that can be, and have been, modified on appropriate occasions under the existing Rule. I would note that in his oral testimony, Professor Schoenbrod expressed a willingness to exclude from any new legislation environmental enforcement actions brought by the Department of Justice.

8. Would H.R. 3041 effectively end the Justice Department's use of consent decrees to resolve major environmental litigation with states and municipalities?

Yes.

> Would this, in turn, cause the Department to litigate and incur greater costs, which ultimately would have to be borne by American taxpayers?

H.R. 3041 would allow a municipality at various times to move to withdraw from a consent decree and leave the Department to re-prove the ongoing need for the consent decree. This would essentially eliminate a key benefit of the consent decree: finality and certainty. Thus, it is very likely that the federal government will decide to forego the newly uncertain path of the consent decree and simply pursue court-adjudicated decisions, for which the government will already have a strong legal case. Since any future state or local administration could move to withdraw, which would require the Department to establish evidence that by then might be years old, it is likely that the Department will not pursue consent decrees in the first place. That is true even though a state or municipal defendant may well want to settle, and may have the resources to settle—and even though it may well be in the public interest to achieve settlement and immediately start remedying the environmental harm.

When the Department sees litigation through to judgment, it will be entitled, as part of the vigorous representation of its agency client, to seek discovery, take depositions, require expert reports, prove liability, and then seek a remedy directed by the court. Since litigation is already expensive, often resulting in millions of dollars of transaction costs, legislation that would undoubtedly result in increased litigation is not in the public's best interest. In fact, the very types of large municipal infrastructure cases that tend to be cost-effectively resolved by consent decree are also among the most time-consuming and expensive to litigate, because the relief necessarily will extend for years and will be based on expert testimony, municipal finances, and the nature and scope of the environmental harm. An expansion of litigation in the wake of H.R. 3041 would also place further demands on an already over-burdened federal court system.

The inevitable additional costs incurred by the federal agencies—and by the federal courts—will ultimately be borne by the federal taxpayer. And on the other side of the equation are the affected state and local taxpayers, who will bear the added burden of paying for this further litigation on behalf of the state or locality that is party to the case.

9. We understand that H.R. 3862 purports to codify the Meese Memo, which have since been codified in the Code of Federal Regulations. Do you see any need to enact legislation when provisions are already enshrined in the C.F.R.?

No.

The relevant Meese Memo provisions appear in the Code of Federal Regulations at 28 C.F.R. §§ 0.160-0.163. Specifically, § 0.160(d) provides in relevant part:

> Any proposed settlement, regardless of amount or circumstances, must be referred to the Deputy Attorney General or the Associate Attorney General, as appropriate:
> ...

> (3) When the proposed settlement converts into a mandatory duty the otherwise discretionary authority of a department or agency to promulgate, revise, or rescind regulations;
> (4) When the proposed settlement commits a department or agency to expend funds that Congress has not appropriated and that have not been budgeted for the action in question, or commits a department or agency to seek particular appropriation or budget authorization; or
> (5) When the proposed settlement otherwise limits the discretion of a department or agency to make policy or managerial decisions committed to the department or agency by Congress or by the Constitution.

I am personally unaware of any examples of the Department failing to comply with the existing C.F.R. provision in this respect; nor did the other witnesses present any such examples at the hearing.

January 30, 2012

The Hon. Howard Coble, Chairman
The Hon. Steve Cohen, Ranking Member
House Judiciary Committee
Subcommittee on Courts, Commercial and Administrative Law
517 Cannon House Office Building
Washington, DC 20515

Dear Gentlemen,

I am writing to you to express my deep concern and opposition to Bill HR 3041. Let me explain the background to this opposition.

On January 30, 1987, at the age of 11, I became severely disabled due to the rupture of an AVM (arterial venous malformation) in my brain. After a prolonged coma and numerous surgeries, I was placed in a skilled nursing center in Middleboro, Massachusetts. I lived on a specialized neuro-behavioral wing of this center from 1988 until 2007. I wanted to leave the nursing center, but my parents and I were scared. We kept hearing stories of abuse and neglect in group homes. We heard that group homes could not address my specific needs (medical, occupational and physical therapy, etc...) . This turned out to be NOT TRUE.

We heard about the Rolland case which is a class action that was filed in October 2008 under the American with Disabilities Act (ADA) on behalf of thousands of persons with developmental disabilities in nursing facilities in Massachusetts that sought to return to the community with necessary supports. In 1999, then Governor Paul Cellucci signed a settlement agreement or consent decree, which requires the Commonwealth of Massachusetts, through its Governor and various state officials, to transition 150 class members each year for 7 years from nursing facilities to the community. Since I had a developmental disability and lived in a Massachusetts nursing facility, I was a class member of this case.

In 2007, the seventh and final year of the consent decree, my parents and I finally decided to pursue community living with proper supports under the Rolland case. As I mentioned, I was concerned that community living might not meet my needs. In some ways we were brainwashed by the nursing facility to believe for many years that the only safe and appropriate place to live was in a skilled nursing center.

When I left the nursing center in September 2007, I moved into a group home with another individual and an agency, CSI, manages our group home under the review of the Massachusetts Department Disability Services' area office. I cannot express enough how DRAMATICALLY my life has improved by living in the community. My health is better by eating better food, working out at the gym, using a special theracycle at home, going to Braintree rehab to use a walking ambulator machine. My care providers are well trained, friendly, and an important part of my life. I receive much better care than I did at the nursing center. I also go out into the community and help other disabled individuals by writing accessibility reviews on my website, www.thetravelingwheelchair.com.

It took quite a few years for my parents and I to decide to leave the 'security' of the nursing home; when we finally made the decision for me to go back into the community in 2007, all of our fears proved to be unfounded. The quality of my life improved tremendously.

The bill, HR 3041, would have prevented me from leaving the nursing home. In 2001, Governor Cellucci resigned and was succeeded by Governor Jane Swift, who could have moved to end the consent decree. Then in 2002, after the transition from Governor Swift to Governor Mitt Romney, the Rolland consent decree probably would have been ended. We, like many other individuals in a nursing home, needed a few years to prepare for my successful reentry into the community by understanding the benefits of community living and allowing adequate time for state agencies to develop services and systems. By 2007, I was ready to make the transition to community living. The bill HR 3041 would not have allowed us enough time for appropriate planning. If this bill was in effect, I would still be living in a nursing center today.

My life has improved so dramatically due to the Rolland case which helped me to enter successful community living. Please do not pass bill HR 3041. My life has been so positively influenced by the Rolland case. Please allow other individuals to benefit from the Rolland case so there are more people able to enjoy living back in the community.

Sincerely,

Kenny Cieplik

Kenneth Cieplik – father and guardian

Paula Cieplik – mother and guardian

Thomas M. Susman
Director
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February 1, 2012

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Commercial
and Administrative Law
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

The Honorable Steve Cohen
Ranking Member
Subcommittee on Courts, Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 3041, the "Federal Consent Decree Fairness Act"

Dear Chairman Coble and Ranking Member Cohen:

On behalf of the American Bar Association (ABA), which has almost 400,000 members, I write to express our concerns regarding H.R. 3041, legislation that would permit state and local governmental officials to challenge and re-litigate—for any reason—existing federal court consent decrees to which they are a party. If enacted, this legislation would strongly discourage settlements, encourage expensive and protracted litigation, and create undue burdens on the federal court system. Accordingly, we urge you and your colleagues to oppose this legislation, and we respectfully request that this letter be included in the official record of your subcommittee's hearing on the bill scheduled for February 3.

Consent decrees entered by federal courts—usually involving federal government agencies as plaintiffs and state or local governments, companies and/or private individuals as defendants—have long been an effective tool in resolving disputes to the mutual satisfaction of the parties. A consent decree is essentially a settlement agreement reached between adverse parties in a lawsuit that the court then approves and enters as an order of the court. By incorporating the parties' settlement agreement into a court order, the judge can then enforce the terms of the agreement if one side or the other later fails to follow through on its obligations under the agreement.

For many years, consent decrees have been very helpful in resolving a wide variety of claims brought by the federal government, including suits to preserve public health and safety, enforce environmental regulations, and protect individual rights. In fact, consent decrees have been particularly useful in resolving complex disputes that cannot be resolved quickly through the traditional system of full-blown litigation. By entering into consensual agreements, the federal government is able to craft solutions with states, localities, and private parties that a trial court could not otherwise order. Consent decrees also give the parties the flexibility to come into compliance with federal law in a reasonable amount of time and in a manner that may be more achievable than what a court would order. From the defendants' perspective, consent decrees provide a useful

means of promptly implementing voluntary settlements in complex cases, thereby allowing them to avoid the enormous expenses, delays, and liability risks associated with protracted litigation.

As introduced, H.R. 3041 would jeopardize the continuity of many federal court consent decrees entered into by states and local governments. The bill would authorize state or local governments, and related officials sued in their official capacity or their successors, to file motions to modify or vacate consent decrees four years after the consent decree was originally entered or whenever the highest elected state or local government official who is a party to the decree leaves office, whichever occurs first. Once a motion is filed, the burden of proof would shift to the party that originally sought the decree to demonstrate that it should remain in effect. If the party fails to meet the burden of proof, the court would be required to terminate the consent decree. Even if the party meets the burden, however, the court still would be required to narrow the consent decree to the maximum extent possible. The legislation also would force federal courts to rule on the motion in an expedited manner, enter rigid scheduling orders, and severely limit both motions and the discovery process.

In February 2006, the ABA House of Delegates adopted a policy resolution supporting the use of consent decrees as an important tool for resolving litigation and opposing legislation (such as H.R. 3041 and other similar bills introduced in the 109th and 110th Congresses) that constrains the efficacy of consent decrees to which state, local or territorial governments are parties. A copy of ABA Resolution 109 and the related background report is available online at: http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_109.authcheckdam.pdf

In our view, H.R. 3041 would be highly detrimental to the nation's civil justice system for a number of important reasons.

The Legislation Would Strongly Discourage Settlement of Lawsuits in Federal Courts

H.R. 3041 provides that upon the change of the political leadership of a state or locality or four years after a consent decree is entered, whichever comes first, the state or local government could move to modify or vacate the consent decree without offering any reason or justification at all. While the original plaintiff—in most cases, the federal government—could oppose the motion, the bill would shift the burden of proof to that party to prove the underlying basis for continuing the decree. By making consent decrees involving state or local governments inherently temporary and subject to being reopened and re-litigated every four years or sooner, H.R. 3041 would strongly discourage both plaintiffs and defendants from agreeing to settle the cases at all.

The Legislation Would Encourage Expensive and Protracted Litigation

By eliminating the finality and permanence of federal court consent decrees in cases involving state and local governments, H.R. 3041 would create a strong incentive for all parties—including the federal government, state and local governments, businesses and other private parties—to continue litigating their cases all the way to final judgment, and perhaps through the appellate system as well. In addition to the long delays associated with protracted litigation, the parties also would be forced

to incur substantial additional attorney and expert witness fees, discovery costs, and other expenses as well as an uncertain final result.

The Legislation Would Create Undue Burdens on the Federal Court System

By allowing state and local government officials to reopen—and re-litigate—existing federal court consent decrees over and over again for any reason, H.R. 3041 would significantly expand the caseload of the federal trial courts. In addition, the provisions in H.R. 3041 that require federal courts to issue expedited rulings, enter rigid scheduling orders, and then either terminate the prior consent decrees or rewrite them to minimize their scope would impose a substantial and unjustified burden on limited judicial resources and could interfere with the efficient operation of the federal trial court system. In addition, by micromanaging federal district court procedures and arbitrarily shifting the burden of proof applicable to consent decrees entered by the federal courts, these provisions would improperly infringe on the independence of the federal judiciary.

H.R. 3041 is Unnecessary Because Adequate Tools Already Exist to Modify or Vacate Consent Decrees in Appropriate Circumstances

Although federal courts generally enforce consent decrees as written and agreed to by the parties—as they should—existing law also provides mechanisms for the courts to modify or vacate consent decrees for good cause shown. In particular, Federal Rule of Civil Procedure 60(b)(5) allows courts to modify a judgment when "...applying it prospectively is no longer equitable."

The U.S. Supreme Court also recently confirmed the federal courts' existing authority to vacate or modify consent decrees in appropriate circumstances in the case of *Frew v. Hawkins*, 540 U.S. 431 (2004). In that case, the Court articulated the following standard:

> [W]hen the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials. . . . If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms..,

Frew v. Hawkins at 442.

The duration and all other terms of a consent decree should continue to be determined by the language of the decree itself until terminated or modified by a court of competent jurisdiction for good cause shown, not through legislation like H.R. 3041. In addition, the burden of proof with respect to a motion to modify or terminate a consent decree should remain on the party seeking modification or termination, not on the party that obtained the original consent decree. In our view, the existing law governing federal consent decrees strikes the proper balance between enforcing agreements and preserving flexibility, and this system should be preserved.

In sum, the ABA is concerned that if H.R. 3041 is enacted, it could be the death knell for federal court consent decrees to which state or local governmental entities are parties. By discouraging federal government agencies, state or local governments, companies and private individuals from settling their legal disputes and entering into consent decrees, the legislation would result in increased and unnecessary litigation, reduced flexibility and greater burdens on federal courts and agencies, and further erosion of the independence of the federal judiciary. For all these reasons, we urge you oppose the legislation.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the legislation or any other matter, please contact me at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,

Thomas M. Susman

cc: Members of the House Judiciary Committee

NATURAL RESOURCES DEFENSE COUNCIL

February 14, 2012

Honorable Howard Coble, Chairman & Honorable Trey Gowdy, Vice-Chairman
Honorable Steve Cohen, Ranking Member
Subcommittee on Courts, Commercial and Administrative Law
Committee of the Judiciary
517 Cannon House Office Building
Washington, D.C. 20540

Dear Chairman Coble, Vice-Chairman Gowdy and Ranking Member Cohen:

We are writing to request that our views on H.R. 3041, the "Federal Consent Decree Fairness Act," and H.R. 3862, the "Sunshine for Regulatory Decrees and Settlements Act of 2012" be made part of the record of your February 3rd hearing.

The legislation at issue in the February 3rd hearing arises out of the baseless belief that government lawyers engage in "sue and settle" litigation strategies. The "sue and settle" expression alleges that government agencies seek to limit their discretion by colluding with plaintiffs to settle cases. This suggestion is squarely at odds with the Natural Resources Defense Council's (NRDC's) experience. In litigation against the United States over four decades, NRDC attorneys have observed that Department of Justice and state and agency attorneys – without regard to political party – zealously advocate for the government's position. Moreover, we fail to see real world evidence of the "sue and settle" phenomenon, and a careful examination of the testimony by witnesses for the majority fails to establish real world problems that would justify this harmful and heavy-handed legislation.

Both H.R. 3041 and 3862 purport to solve problems that do not actually exist. Both are fundamentally flawed pieces of legislation that we urge the subcommittee to oppose for the reasons discussed below.

First, the premise of the legislation is unfounded and indeed unsubstantiated. The "sue and settle" allegations implicit in both bills and reflected in the hearing testimony on February 3rd amount to serious charges of intentional wrongdoing – that federal agencies and third parties conspire to settle litigation to advance untoward policy and legal objectives. Yet the written and oral testimony on these bills is devoid of any evidence whatsoever of that intentionality. For example, majority witness Andrew Grossman of The Heritage Foundation asserts in his written testimony that "[i]n some cases, these [consent] decrees appear to be the result of collusion,

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where an agency shares the goals of those suing it and takes advantage of litigation to achieve those shared goals." Nowhere in his written testimony, however, does Mr. Grossman furnish evidence backing this claim; the most he can muster is the weak statement that this "appear[s]" to be the case to him. Similarly, no other witnesses or members at the hearing offered proof that rose above their subjective interpretation or speculation. Unsubstantiated charges from those with an anti-regulatory political agenda should not form the basis for legislation.

Second, this legislation ignores the legal mechanisms already in place to ensure transparency, public participation, and an agency's maintenance of its discretionary powers and legal responsibilities. Notably, the witnesses for the majority praise these existing mechanisms at length in their testimony. Mr. Grossman lauds the so-called "Meese Policy" as an exemplary non-partisan approach that recognizes the appropriate place for the Executive Branch of government, yet he fails to acknowledge current practices that limit what the federal government can agree to when it enters into consent decrees or settlements regarding discretionary duties.[1]

Roger Martella, another witness for the majority, also praises current administrative processes, identifying "every significant administrative law initiative" as having "three inexorable components: the agency's proposed rule, the final rule, and the litigation by the loser in the rulemaking." Moreover, Mr. Martella does not think "we can or should endeavor to change those components." As Mr. Martella highlights, in the rulemaking context an agency may not evade or subvert required notice and comment rulemaking procedures through a consent decree or settlement. The agency ordinarily is prohibited from committing to the substance of final regulations in resolving litigation, but instead must follow applicable notice and comment procedures on any new rules it issues.

American Nurses Association v. Jackson, a case cited by Mr. Grossman in his testimony, provides a perfect example of this procedure. We feel compelled to address this case at some length to rebut Mr. Grossman's unfounded charges since NRDC was a plaintiff in that lawsuit. In that case, the Environmental Protection Agency (EPA) merely agreed to propose standards by a certain date and to finalize standards by a later date. No particular outcomes or substantive positions were mandated by the consent decree. The agency provided a formal comment period of 90 days on the proposed standards, but made the proposal publicly available for nearly 140 days before that comment period closed. And the consent decree was open to being modified jointly by the parties or unilaterally by the agency (with court approval), a common feature of agency consent decrees. Further, section 113(g) of the Clean Air Act requires that the agency take public comment on consent decrees, providing yet another opportunity for public input.

Moreover, what Mr. Grossman failed to note in his testimony is that the clean air standards at issue in the consent decree *already* were over a decade overdue based on deadlines for action that *Congress itself* had set when amending the Clean Air Act in 1990. EPA had violated a mandatory duty to issue these standards by a statutory deadline, the agency

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1 Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys (Mar. 13, 1986); *See also* Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, for Raymond C. Fisher, Associate Attorney General (June 15, 1999) *available at* http://www.justice.gov/olc/consent_decrees2.htm; 28 C.F.R. Subpt. Y (2012)

acknowledged that it had missed this statutory deadline, and the court would not have approved the consent decree had the court not agreed that EPA had violated a mandatory statutory duty.[2] Mr. Grossman's testimony levels complaints at the EPA mercury and air toxics standards, but these are all the same issues that industry raised during the comment period and still may raise in court to challenge the final standards. This proves the point that existing administrative and judicial processes provide opportunities for public participation and the full exercise of legal rights, without the need for misconceived legislation like H.R. 3862. Mr. Grossman represented groups opposed to the *American Nurses Association* consent decree and unsurprisingly he repeats that opposition in his testimony; but at bottom his disagreement is over the substance of the proposal, not any procedural failings, and the requirement to issue standards originated with Congress (author of the 1990 Clean Air Act amendments) and was simply enforced by the courts (bound to uphold that law).

As *American Nurses Association* and scores of other examples indicate, parties and non-parties alike interested in administrative actions envisioned by settlement agreements or consent decrees have the opportunity to submit comments on proposed agency rulemakings in advance of rules being finalized. Further, any party may sue an agency regarding the substance of a final rule. In short, consent decrees and settlement agreements do not determine the substance of rules; the consent decrees are simply enforcing *mandatory* statutory duties (such as deadlines). Under federal environmental laws, for example, there are innumerable examples in which EPA settlements with industry plaintiffs or public health plaintiffs have resulted in *proposed* rulemakings that opposing parties are free to comment on and subsequently challenge in court.[3]

Third, the bills subvert the power of the judiciary as well as the authority and prerogatives of the executive branch as a means of skewing outcomes. The complaints at the Subcommittee hearing were more about opposition to the underlying statutory mandates than to the vehicles for enforcing those mandates.

Among other ways the legislation would needlessly upend the current system, it would make significant and controversial changes to the Federal Rules of Civil Procedure without following the normal processes for amending those rules. For good reason, the federal Judicial

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2 Shortly before promulgation of the final regulations at issue in the consent decree, industry intervenors sought to interfere with the decree and unilaterally alter its terms to delay those regulations by a year. The court rejected that industry motion. When the industry intervenors sought to *re-file* an essentially identical motion a short while later, Mr. Grossman filed a brief supporting the industry intervenors. The court did not even bother to rule on that repetitive motion, making clear it was no more meritorious than the first one.

3 For example, in 2010 NRDC and its partners reached a settlement with EPA concerning a legal challenge to an agency regulation governing industrial livestock operations (known as concentrated animal feeding operations, or "CAFOs"). In that agreement, which we viewed as a very modest step forward, EPA agreed merely to *propose* to collect 14 pieces of basic operating and discharge information from all CAFOs nationwide – and to take comment on that proposal before deciding whether to actually take any final regulatory action – or explain why the agency was proposing not to collect any particular piece. While EPA agreed to take final *action* on the proposal, it did not agree to take any particular action. It did *not* agree to promulgate any rule, let alone a rule with a particular outcome. Industry was free to comment adversely on the EPA proposal and did so. Accordingly, this situation – and innumerable other ones involving settlement agreements – was no different materially from any other rulemaking: EPA put forward its ideas, it took public comments and will evaluate those comments (including from industry, conservation groups and concerned citizens), and the agency will take some final action based on all comments and evaluation of the law and what it considers to be sound policy.

Conference in the past has opposed bills that bypass the normal amendments procedure. For example, in 2008, the Honorable Mark R. Kravitz, on behalf of the Judicial Committee of the United States, opposed a not altogether dissimilar bill called the "Sunshine in Litigation Act of 2008." He wrote that the legislation – like H.R. 3862 and H.R. 3041 – effectively amended "the Federal Rules of Civil Procedure outside the rule-making process," contrary to federal law, where "[d]irect amendment of the federal rules through legislation, even when the rule-making process has been completed, circumvents the careful safeguards that Congress itself established."[4]

Specifically, H.R. 3041 would undermine the Supreme Court case of *Frew v. Hawkins,* 540 U.S. 431 (2004), cited in the legislation. *Frew* unanimously held that courts, using Federal Rule of Civil Procedure 60(b) (which discusses the modification of consent decrees) can appropriately accommodate the concerns of state and local government parties to consent decrees. This legislation would undermine FRCP 60(b) and the unanimous decision of the Supreme Court in *Frew* by altering the way in which consent decrees could be modified.

The bills also create new procedural obstacles to resolving litigation early in the process, wasting the time and resources of litigants and the courts and conflicting directly with the expressly stated and longstanding policy of the federal judiciary. The advisory committee notes to Federal Rule of Evidence 408 specifically invoke "the public policy favoring the compromise and settlement of disputes." *See* http://www.law.cornell.edu/rules/fre/rule_408.

Above all, the legislation ignores the role of the judiciary in resolving disputes by ignoring the reason that many of these consent decrees occur at all. In drafting legislation, Congress sets deadlines and priorities when it directs agencies to undertake certain rulemakings. When these deadlines are missed, it is the proper role of the judiciary to ensure that laws, as written by Congress and signed into law by the president, are properly enforced. Again, the majority's witness, David Schoenbrod, proves this point in his testimony, noting that EPA "had met only 14 percent of the hundreds of deadlines set for it by Congress." The proper role of the judiciary is to enforce the statutory deadlines set and written into law by Congress rather than further impede the agency from meeting these deadlines. Preventing the judiciary from enforcing statutory deadlines is not an appropriate way to alter the regulatory system, and would gradually turn regulatory statutes into dead letters.

These bills, and the majority witnesses' testimony, would have you believe that these radical shifts in the balance of power are costless and serve only to increase transparency in agency decision-making. This could not be further from the truth.

This legislation creates a judiciary that is required to obstruct settlement agreements and consent decrees, increasing transaction costs for all parties and the courts. This would mean the loss of efficiency, flexibility and the more timely enforcement of the law that consent decrees and settlements deliver. Costly and protracted litigation would mean that agency wrongs would take even longer to be rectified.

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4 Statement of the Hon. Mark R. Kravitz to the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, Hearing on the "Sunshine in Litigation Act of 2008," H.R. 5884, at 1-2, *available at* http://www.uscourts.gov/uscourts/News/2008/docs/Statement_of_Judge_Kravitz_for_7-31-08_Hearing.pdf.

H.R. 3041 addresses federal consent decrees entered into with state or local governments, and in doing so, upends the Federal Rules of Civil Procedure and federal courts' equitable powers. This bill creates dangerous law that would make it more difficult for parties to achieve meaningful settlement, inviting perpetual re-litigation of long-term consent decrees, such as those that have been used to address chronic water pollution problems caused by sewage system overflows.

Similarly, H.R. 3862 targets agency actions that are the subject of federal consent decrees and settlement agreements. This bill, like H.R. 3041, interferes with a court's ability to oversee consent decrees and the ability of parties to enter into settlements, creating a dangerous presumption that would cause delay, greatly increase the costs of litigation, and impede meaningful resolution of lawsuits.

These two bills would radically undermine the federal court system and represent a direct attack on the foundational rule of law and separation of powers principles that govern the United States. The legislation, and the majority's witnesses, level serious but unsupported assertions of agency impropriety, all while ignoring mechanisms already in place that prevent such behavior and support transparent decision-making. Moreover, the bills would burden the judicial branch, which encourages parties to settle, while greatly increasing the costs of litigation. A section-by-section critique of the legislation follows.

H.R. 3862

H.R. 3862 is ambiguously drafted legislation. It would lead to a series of harmful consequences that we hope are unintended. But the bill's fundamental flaw is that it offers irresponsible, ideological "solutions" to a problem that, as noted above, does not exist. Passage of H.R. 3862 would prolong litigation, undermine law enforcement and legal protections for health and safety; and further overburden the courts, creating incentives for unlawful agency activities.

H.R. 3862 Section – by – Section Analysis

Section 2(a)

This section sweeps broadly, applying to any consent decree or settlement agreement applying to "agency action that pertains to a regulatory action" that "affects" the rights of nonparties to the agreement. Specifically, "private parties" whose "rights" are affected by the regulatory action have the special ability to get involved in the lawsuit, but these terms are undefined. Without clear definitions, these essential terms are subject to distortion that could itself spawn litigation and subvert established legal concepts.

Section 2(b)(2)

Section 2(b)(2) prevents entry of a consent decree or a court's dismissal pursuant to a settlement agreement "[u]ntil the conclusion of an opportunity for affected parties to intervene in

the action." Again, the operative terms in this section are undefined. The bill does not state when the "conclusion of an opportunity for affected parties to intervene in the action" would occur. Intervention is sometimes permitted years after a case began; in some instances, a party may even be permitted to intervene after district court judgment is entered, for the purposes of prosecuting an appeal. In this context, the meaning of "an opportunity . . . to intervene" is at best unclear and would surely lead to significant and unnecessary litigation. For example, the provision could be read to prohibit early settlement, forcing the parties to continue to litigate cases that they do not wish to litigate, or even if they lack a good faith basis for doing so. This would be a complete waste of public and judicial resources. As written, this provision could produce lengthy, even indefinite delays in litigation, with a corresponding burden on both the court and the parties' – including the taxpayers' – resources.

Section 2(b)(3)

The presumption required by this section subverts the current understanding and evidentiary foundation regarding inadequate legal representation.

Section 2(b)(4)

Section 2(b)(4) subverts law enforcement and the rule of law. It allows parties that oppose such law enforcement the unprecedented opportunity to obstruct and delay requirements to follow federal law. Consider the situation in which a federal agency commits a gross violation of a federal law and a state challenges that lawbreaking in court. Today, the state and federal agency have the ability to resolve that obvious legal violation and to do so through a consent decree or settlement agreement, promptly, without wasting judicial resources, while ensuring federal law is upheld and the state's valid legal interests safeguarded.

Section 2(b)(4) thwarts all of that. The bill anoints third parties that support the perpetuation of the grossly unlawful behavior with the right to obstruct and delay a plaintiff's legal right to ensure that the law is followed and the plaintiff's valid interests protected. It matters not under the bill whether those plaintiffs are individuals, corporations, nongovernmental organizations or any special interest, nor does it matter whether those third party interests are illegitimate and illegal, or whether the plaintiff is prejudiced and harmed. In all cases in which these third parties gain intervenor status, courts *must* delay and deny enforcement of the law by referring the case to a mediation program or magistrate judge to "facilitate settlement discussions" that must include the plaintiff, defendant agency and all intervenors. Thus, the bill jettisons the proper enforcement of federal statutes and the rule of law into a purgatory of continuing lawlessness. And intervenor(s) dedicated to the perpetuation of illegal behavior are granted legal standing to negotiate, obstruct or delay the obligation to follow the law, over the strong objections of the injured plaintiff.

Exactly how do the bill's drafters imagine that settlement discussions will occur involving a defendant agency that broke the law but was willing to correct that wrongdoing; an intervenor committed (for whatever reason) to the continuing violation of the law and opposed to such correction; and a plaintiff whose interests and legal right concern the upholding of the law?

This process will guarantee the prolonging of the illegal behavior and the continuing injury of the plaintiff.

Perversely, section 2(b)(4) even forces plaintiffs to participate in costly mediation activities, with the bill making no provision for their costs to be paid, of course, thereby imposing an unprecedented legal and financial burden on the legitimate interests of states, individuals, businesses and other groups that want to ensure that the federal government follows the law. Requiring parties to enter into and pay for mediation could substantially burden the public right of access to the courts, and in doing so impinge on this fundamental First Amendment right. Section 2(b)(4) fails to specify the duration of the mediation or any ability to opt out if the mediation is not working. In the real world all these defects are a recipe for failure and prolonged unlawfulness.

It bears emphasizing that the bill's indiscriminate anointment of intervenors to exercise this manner of obstruction and delay will harm plaintiff corporations, state and local governments, nonprofit groups and individuals alike, when they or their interests have been harmed by federal agency lawbreaking. The bill guarantees equal opportunity unfairness and injustice for all plaintiff classes seeking to uphold the law. Worse, the legislation inexplicably and irresponsibly sides with parties supporting continued lawbreaking against parties seeking to require the upholding of laws, legally protected interests, and the rule of law itself.

Section 2(b)(5)

This section underscores the extent to which this bill ignores current mechanisms in the law that prevent parties to a lawsuit from interfering with the rights of nonparties. The bill entirely ignores existing statutes' relevant provisions that specifically allow for input from nonparties to a consent decree. For example, section 113(g) of the Clean Air Act requires that the EPA Administrator publish in the Federal Register notice of a consent decree or settlement agreement 30 days before it is finalized. At that time, nonparties provide comments to the Administrator and Attorney General, who can then withhold his or her consent to the proposed order or agreement.

Section 2(b)(8)

Section 2(b)(8) creates the obligation to catalog all mandatory rulemaking duties and describe how certain consent degrees or settlement agreements "would affect the discharge of those duties." This provision would be extraordinarily burdensome and time-consuming for agencies and the section has no clear limitation on this vague directive. The determination of what constitutes a mandatory duty is not without controversy, and the very creation of the catalogue contemplated by the section could be an extremely contentious and lengthy process. Further litigation over whether the agency has accurately listed these duties would result, and would further burden the courts, benefiting no one but lawyers.

Section 3

This section upsets longstanding Supreme Court precedent on the standards for modification of consent decrees, and allows a settlement to be second-guessed *de novo* merely because of "changed circumstances" or "the agency's obligations to fulfill other duties." This is a radical reformulation of modification procedures that will result in more intrusive court interference with the executive branch, rather than less, since the federal government has little control over the resolution of a case that goes to trial. This provision provides a lopsided benefit to defendant agencies in all cases that are settled, allowing agencies to effectively escape settlement agreements and consent decrees they did not care to go forward with.

H.R. 3041

H.R. 3041 Section – by – Section Analysis

H.R. 3041 warrants many of the same objections as H.R. 3862, in the context of federal consent decrees entered in cases involving state and local government defendants.

Section 2

This section would undermine FRCP 60(b) and the unanimous decision of the Supreme Court in *Frew*, as discussed above.

Section 3(b)(1)

Section 3(b)(1) of the bill most directly undermines the *Frew* holding and FRCP 60(b), by tying the ability to modify a consent decree to either an elected official's term in office or four years, whichever is earlier. These artificial time constraints radically undo the certainty and finality that a consent decree can provide parties resolving litigation. This would tie the court's and the parties' hands should they prefer to settle instead of using up valuable time and resources to litigate all cases. Consent decrees could be undone with a simple change of political party, which would have the effect of reopening the consent decree, and, as seen below, essentially requiring the filer-party to prove its entire case in an extremely short timeframe.

The bill does this by allowing state and local government to revisit obligations reflected in consent decrees irrespective of whether the underlying illegal behavior has been cured, the injuries remedied, or the public's interests restored by the decree's remediation measures. The bill does not begin to justify this across-the-board and arbitrary amnesty. To our knowledge there is no precedent for such amnesty and it cannot be justified for illegal actions that, under the bill, are excused even if they represent serious and longstanding violations of federal health and safety laws or financial wrongdoing that costs citizens or the private sector billions.

The natural consequence of this provision would be to create a strong disincentive to settling with state and local governments. The plaintiffs will simply take their cases to trial, at considerable expense, including to the state and local governmental defendants. Courts will impose remedies that – unlike consent decrees – the state and local defendants will have had no

hand in shaping. We cannot imagine that state and local governments would, on reflection, wish to deprive themselves of the opportunity to settle on terms that they deem reasonable. But that would be the likely result of this legislation.

Section 3(b)(2)

This section places a heavy hand on the judicial scales in favor of state and local governments and officials, with the result that justice is denied to non-governmental parties injured by government actions that are indisputably illegal. Rather than following the directive of FRCP 60(b) that any party wishing to modify a consent decree may move to do so, this section of the bill would shift the burden of proof to the party "who originally filed the civil action" – that is, the non-governmental plaintiffs injured by illegal government actions.

These non-governmental parties would be required "to demonstrate that the denial of the motion to modify or terminate the consent decree or any part of the consent decree is necessary to prevent the violation of a requirement of Federal law" in certain enumerated situations. If the filer-party could not make this showing, the consent decree would automatically terminate. Even if the burden of proof were met, the provisions of the decree must be assessed to ensure they "represent the least restrictive means by which to prevent such a violation" – no matter how great the harm to the public or non-governmental parties. Taken together, these provisions fundamentally weaken consent decrees and the value of entering into them. These provisions further act to penalize parties who wish to ensure that laws are enforced, all while upending the Federal Rules of Civil Procedure and disturbing the courts' equitable powers.

As indicated by these section – by – section analyses and testimony of the majority witnesses, these two pieces of legislation would fundamentally undermine agency decision-making and subvert judicial branch authority to uphold the law and ensure its continued enforcement. The flaws in these two bills are so endemic and serious that no tweaks to individual sections can render the bills worthy of passage.

For the foregoing reasons, NRDC strongly opposes H.R. 3862 and 3041. We urge Subcommittee members to vote No on these two bills.

Sincerely,

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